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MASSACHUSETTS REPORTS ^{c#}
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CASES ARGUED AND DETERMINED

Massachusetts ^{IN THE}
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

MAY 1914—OCTOBER 1914

HENRY WALTON SWIFT

REPORTER

BOSTON
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JUSTICES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.

HON. JOHN WILKES HAMMOND.

HON. WILLIAM CALEB LORING.

HON. HENRY KING BRALEY.

HON. HENRY NEWTON SHELDON.

HON. CHARLES AMBROSE DE COURCY.

HON. JOHN CRAWFORD CROSBY.

ATTORNEY GENERAL

HON. THOMAS JEFFERSON BOYNTON.

IN pursuance of the system adopted in 1874, beginning with 115 Mass., the cases are reported in the order of decision, and those decided on the same day are arranged according to the dates of argument or submission on briefs. The only exception to this rule is that, where an opinion is withdrawn temporarily by order of the court and is returned to the reporter too late to be printed in its regular place, it is inserted at the time of its return.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

EMILY M. SUNDINE'S CASE.

Suffolk. March 3, 1914.—May 22, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Workmen's Compensation Act.

Under St. 1911, c. 751, Part III, § 17, and Part V, § 3, as amended by St. 1912, c. 571, § 17, an employee of a contractor, who has agreed to make a part of the clothing to be furnished by a tailor who has obtained insurance under the provisions of the workmen's compensation act, has the same rights against the insurer as if the insurance had been taken out by his own employer.

An injury sustained by a workman employed by the week, when such workman at the noon hour has left the workroom in which he is employed and is on his way to lunch, can be found to have arisen out of and in the course of his employment, it being an incident of such employment to go out for this purpose.

An injury sustained by a workman, who is employed by the week to work in a room leased to his employer in a building owned by the lessor, when the workman on his way to lunch is descending a stairway that is in the control of the owner of the building but which the employer and his employees have the right to use and which is the only means available for going to and from the workman's place of employment, can be found to have arisen out of and in the course of his employment within the meaning of the workmen's compensation act, it being a necessary incident of the workman's employment to use these stairs.

APPEAL from a decree of the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board.

The case was heard by *Crosby*, J. The Industrial Accident Board upon an agreed statement of facts found as follows:

Emily Sundine, the employee, in the employ of one Olsen named below, was injured on November 29, 1912, while coming down a flight of stairs leading from the third floor to the second floor of the building numbered 376 on Washington Street in Boston. She was coming from the workroom of F. L. Dunne and Company on the fourth floor of the building at about noon. At the time of the accident she was on her way out to luncheon and was descending to the street, accompanied by another woman. She fell from the second or third step from the top of the flight of stairs to the bottom and sprained her right ankle. The stairs were of wood and the treads of the stairs were somewhat worn. There was no artificial light for these stairs and the upper part of the flight was dark.

This was the only flight of stairs by which the employee could reach or leave the workroom; there was no elevator for her to use, and it was necessary for her to use this flight of stairs in going to and from her work. The employee contended that the accident was due to the insufficient lighting of these stairs and also to the fact that they were worn down, causing her to fall.

F. L. Dunne and Company on the day of the accident were the lessees of the workroom in which the employee worked on the fourth floor, being sublessees from A. H. Howe and Sons, who were the lessees of the whole building. The workroom was used exclusively for making clothing for F. L. Dunne and Company, who were tailors and let out their work to different men who were paid a stipulated price per garment, F. L. Dunne and Company furnishing the goods. One of the men who made clothing for F. L. Dunne and Company in this room was Olsen, and Olsen paid the employee her weekly wages of \$12 a week for assisting him in making clothing for F. L. Dunne and Company. F. L. Dunne and Company were covered by insurance under the workmen's compensation act by the London Guarantee and Accident Company, Limited. Olsen was not covered by insurance under the act.

The employee was out of work from November 29, 1912, to February 24, 1913, which was the earliest date at which she was

able to go to work. The attending physician's bill for the first two weeks' services was \$24.

The decision of the board was as follows:

"We find that it was a necessary incident of her employment to use the flight of stairs upon which she was when she was injured and, therefore, rule that the injury arose out of and in the course of her employment.

"It also appears from the statement of facts that Olsen, for whom the employee was working, was a contractor for F. L. Dunne and Company within the meaning of Part III, § 17, of the workmen's compensation act, and we rule that she is entitled to compensation.

"It was agreed that her average weekly wages were \$12. We, therefore, find that she is entitled to compensation at the rate of \$6 a week from the fifteenth day after her injury, to wit, from December 13, 1912, to the 23rd day of February, 1913, inclusive, amounting in all to sixty-two dollars and fifty-seven cents, together with her physician's bill for medical services for the first two weeks after the injury, which it was agreed was \$24, amounting in all to \$86.57."

The judge made a decree in accordance with the decision of the Industrial Accident Board, ordering that the insurer should pay to the employee the total amount of \$86.57. The insurer appealed.

H. S. Avery, for the insurer.

R. J. Lane, for the employee.

SHELDON, J. It is provided by statute (St. 1911, c. 751, Part III, § 17) that "if a subscriber enters into a contract, written or oral, with an independent contractor to do such subscriber's work . . . and the association would, if such work were executed by employees immediately employed by the subscriber, be liable to pay compensation under this act to those employees, the association shall pay to such employees any compensation which would be payable to them under this act" if the independent contractor were a subscriber. By the word "association" is meant the Massachusetts Employees' Insurance Association, Part V, § 2, of the same act; and this insurance company is under the same liability that the association would have been. St. 1912, c. 571, § 17. It follows that the petitioner has the same rights

against this insurance company as if it had directly insured her employer Olsen.

The insurer does not deny this, but it contends that the petitioner's injury did not arise "out of and in the course of" her employment within the meaning of Part II, § 1, of the act first referred to. This is because she was injured at about noon, after she had left the room in which she worked for the purpose of getting a lunch, and upon a flight of stairs which, though affording the only means of going to and from her workroom, was yet not under the control either of Olsen, her employer, or of F. L. Dunne and Company, for whose work Olsen was an independent contractor.

The first contention, that she was not in the employ of Olsen while she was going to lunch, cannot be sustained. Her employment was by the week. It would be too narrow a construction of the contract to say that it was suspended when she went out for this merely temporary purpose and was revived only upon her return to the workroom. It was an incident of her employment to go out for this purpose. *Boyle v. Columbian Fire Proofing Co.* 182 Mass. 93, 102. The decisions upon similar questions under the English act are to the same effect. *Blovelt v. Sawyer*, [1904] 1 K. B. 271, which went on the ground that the dinner hour, though not paid for, was yet included in the time of employment. *Moore v. Manchester Liners*, 3 B. W. C. C. 527, where the House of Lords reversed the decision of the Court of Appeal, reported in [1909] 1 K. B. 417, and held, following the dissenting opinion of Moulton, L. J., that a temporary absence by permission, though apparently of longer duration than would have been likely in the case before us, did not suspend the employment, and that an injury occurring during such a temporary absence arose "out of and in the course of" the employment. *Gane v. Norton Hill Colliery Co.* 2 B. W. C. C. 42, and [1909] 2 K. B. 539. *Keenan v. Flemington Coal Co.* 40 Sc. L. R. 144. *MacKenzie v. Coltness Iron Co.* 41 Sc. L. R. 6.

Nor do we regard it as decisive against the petitioner that she was injured while upon stairs of which neither Olsen nor F. L. Dunne and Company had control, though they and their employees had the right to use them. These stairs were the only means available for going to and from the premises where she

was employed, the means which she practically was invited by Olsen and by F.L. Dunne and Company to use. In this respect, the case resembles *Moore v. Manchester Liners*, *ubi supra*; and that case, decided under the English act before the passage of our statute, must be regarded as of great weight. *McNicol's Case*, 215 Mass. 497, 499. It is true that before the passage of St. 1911, c. 751, the petitioner could not have held her employer for this injury. *Hawkes v. Broadwalk Shoe Co.* 207 Mass. 117. But that now is not a circumstance of much importance; for one of the purposes of our recent legislation was to increase the right of employees to be compensated for injuries growing out of their employment.

It was a necessary incident of the employee's employment to use these stairs. We are of opinion that according to the plain and natural meaning of the words an injury that occurred to her while she was so using them arose "out of and in the course of" her employment. The decree of the Superior Court must be affirmed.

So ordered.

ISRAEL RIBOCK v. CARL CANNER & another.

Suffolk. March 4, 1914. — May 22, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Frauds, Statute of.

An oral promise, made to a contractor for the mason work of certain houses by the mortgagee under a construction mortgage upon the property, that, if the contractor will go on with his work under his contract with the builder, the mortgagee will pay him the amounts that become due to him under this contract, is a promise to answer for the debt of another under R. L. c. 74, § 1, cl. 2, on which the contractor can maintain no action against the mortgagee, if the defense of the statute of frauds is set up in the answer. In such an attempted action it does not help the plaintiff to prove that there was a valuable consideration for the defendant's promise or to show that the defendant made payments from time to time in part performance of his oral promise.

CONTRACT for \$1,050 alleged to be due to the plaintiff, who was a contractor for mason work, from two defendants, Canner

and Levin, who were copartners engaged in the business of lending money on construction mortgages. Writ in the Municipal Court of the City of Boston dated May 10, 1912.

The answer as amended contained a general denial and set forth that the alleged contract of the defendants was a contract to answer for the debt, default and misdoings of another and that there was no contract or memorandum thereof in writing signed by the defendants or either of them or any person thereunto by them lawfully authorized.

On appeal to the Superior Court the case was tried before *Hitchcock, J.* At the close of the evidence, which is described in the opinion, both defendants asked the judge to rule that the plaintiff was not entitled to recover against them and the defendant Levin also separately asked for a ruling that there was no evidence to warrant a verdict against him.

The judge refused to make either of these rulings, and submitted the case to the jury, who returned a verdict against both defendants in the sum of \$1,050. The defendants jointly, and also the defendant Levin separately, alleged exceptions.

E. Greenwood, for the defendants.

A. A. Ginzberg, (*M. Tobey* with him,) for the plaintiff.

SHELDON, J. The plaintiff had begun to do work upon three houses which Hoffman and Potick (hereinafter called the builders) were erecting in Chelsea; and for this work the builders by a written contract had promised to pay the plaintiff the sum of \$5,150. The defendants had taken from the builders a construction mortgage upon the property for more than \$13,000, which sum they were to advance to the builders in instalments as the work progressed. When only a small part of his work had been done, the plaintiff became suspicious of the financial responsibility of the builders, and refused to go on unless they would give him a written order upon the defendants to pay him for his work out of the advances to be made by the defendants on the mortgage. The builders gave him such an order, and he presented it to the defendant Canner for acceptance. Canner refused to accept the order, but in substance, according to the testimony of the plaintiff, which must have been followed by the jury, told the plaintiff to "go ahead with the job," and he would pay him the money; that the plaintiff should have nothing

"to do with them builders," but that the plaintiff, whenever he was "ready by his paper," should come up with a notice, and he would give the plaintiff a check. This plainly meant that when money became due to the plaintiff by his contract with the builders, Canner would pay him whatever was so due. There was not by any fair construction of the language used a new and independent agreement between Canner and the plaintiff that the plaintiff should go on and do the work upon Canner's credit and that Canner should pay for it, as in *Abbott v. Doane*, 163 Mass. 433, and other cases relied on by the plaintiff. On the contrary, the contract between the plaintiff and the builders remained in full force; the amounts to become due to the plaintiff were fixed by that contract, and the liability of the builders to the plaintiff was wholly unaffected. Canner's promise was merely an oral promise to pay to the plaintiff what should become due to him from the builders, and as such came within the statute of frauds. R. L. c. 74, § 1, cl. 2. That defense was set up in the answer. It was a bar to any action upon the promise, even though it could be found that there was a valuable consideration therefor. *Tilston v. Nettleton*, 6 Pick. 509. *Loomis v. Newhall*, 15 Pick. 159, 169. *Ames v. Foster*, 106 Mass. 400. *O'Connell v. Mount Holyoke College*, 174 Mass. 511, 513. *Miles v. Driscoll*, 201 Mass. 318.

The payments made afterwards from time to time by Canner to the plaintiff, in part performance of his oral promise, have no bearing upon this question.

As Canner's promise will not support any action, we need not consider whether the other defendant in any event could have been held thereon.

The case appears to have been fully tried. It comes within the terms of St. 1909, c. 236. The defendants' exceptions must be sustained and judgment must be entered in their favor.

So ordered.

JOHN J. BURNS'S (dependent's) CASE.

Suffolk. March 4, 1914. — May 22, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Workmen's Compensation Act. Proximate Cause. Words, "Injured."

Under the workmen's compensation act a finding of the Industrial Accident Board, that a personal injury to an employee arising out of and in the course of his employment and resulting in his death was not due to the serious and wilful misconduct of his employer, so that the compensation to be paid is not to be doubled under St. 1911, c. 751, Part II, § 3, is final, if there was any evidence to warrant it.

The serious and wilful misconduct of an employer, which under the provision of St. 1911, c. 751, Part II, § 3, requires the doubling of the compensation to be paid for an injury to an employee under the workmen's compensation act, is much more than mere negligence or even gross or culpable negligence, and involves the intentional doing of something likely to result in serious injury to others, either with knowledge of or with a wanton and reckless disregard of the probable consequences. By SHELDON, J.

Where an employee received a mortal injury arising out of and in the course of his employment, consisting of a fracture of the spine with a severance of the spinal cord, which caused not only a paralysis of the legs but a loss of power and sensation below the seat of injury, and, being under proper medical care until his death, the employee was obliged to lie in bed in one position until an extensive bed sore was developed which finally produced blood poisoning that was the immediate cause of his death, and where a physician testified that the death resulted from the injury, it was *held*, that a finding of the Industrial Accident Board that the death of the employee resulted from the injury was warranted by the evidence and was not wrong as matter of law. And it was *said*, that, if the bed sore had been due to mistake or negligence on the part of the physicians acting honestly, this fact would not have been material, as it would not have broken the natural and probable connection between the injury and its consequences.

Under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 11, as amended by St. 1913, c. 696, an award of additional compensation may be made on the ground that the legs of a workman were "so injured as to be permanently incapable of use," where a paralysis of the legs and feet was caused solely by an injury to the spine and spinal cord.

The additional compensation under the workmen's compensation act, which is provided by St. 1911, c. 751, Part II, § 11, as amended by St. 1913, c. 696, for a total or partial loss or permanent incapacity of certain members of the body of an employee, like the compensation for incapacity for work provided for by §§ 9, 10, of St. 1911, c. 751, Part II, is intended for the relief of the employee himself, and an original order for its payment cannot be made after his death.

Where under the provisions of the workmen's compensation act an injured em-

ployee upon his own application has been awarded during his lifetime a specific compensation for a stated number of weeks for incapacity to work and his death occurs before the expiration of the period, *whether* the right thus adjudicated ceases at his death or whether the payments must be continued until the end of the appointed time, here was referred to as a question that was not passed upon.

APPEAL from a decree of the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board.

The case was heard by *Crosby, J.* The material facts found by the Industrial Accident Board are stated in the opinion, where also are stated the questions of law raised by Bridget Burns, the executrix of the will of the deceased employee and his dependent widow, and by the insurer.

The judge made a decree, reciting that it appeared by the decision of the Industrial Accident Board that the deceased employee received a personal injury arising out of and in the course of his employment which terminated fatally, and that such personal injury was not caused by the serious and wilful misconduct of the employer, and ordering that there be paid by the insurer to Bridget Burns, as executrix, specific compensation under St. 1911, c. 751, Part II, § 11, amounting to \$68.46, being ten and one seventh weeks' compensation under that section at \$6.75 a week and eight and one seventh weeks' compensation under Part II, § 9, on account of total incapacity for work at the rate of \$6.75 a week, that is \$54.96, and that there be paid to Bridget Burns as dependent widow, who lived with her husband at the time of his death, the sum of \$6.75 weekly, that is, one half his average weekly wages, for a period of three hundred weeks from the date of his injury, less eight and one seventh weeks' compensation to be paid the executrix on account of total incapacity for work before the date of his death, and a reasonable allowance for medical and hospital service and medicines during the first two weeks after the injury.

The insurer, and also Bridget Burns as executrix, appealed from the decree.

A. L. Richards, for the insurer.

J. E. Reagan, for the executrix and dependent widow.

J. A. McCaig, for the employer.

SHELDON, J. 1. Under the provisions of St. 1911, c. 751, Part

II, § 3, if the injury to the petitioner's husband was due to the serious and wilful misconduct of his employer, the compensation must be doubled. She contends that this was the case. The Industrial Accident Board has found against her contention, and this finding is final, if there was any evidence to support it. *Herrick's Case*, 217 Mass. 111, and cases there cited.

The question is not whether it could have been found that the injury was due to the serious and wilful misconduct of the employer, but whether we can say that the finding made was wholly unwarranted. Serious and wilful misconduct is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences. *Banks v. Braman*, 188 Mass. 367, and 192 Mass. 162, note. *Warren v. Pazolt*, 203 Mass. 328, 347. *Yancey v. Boston Elevated Railway*, 205 Mass. 162, 171. *Willis v. Boston & Northern Street Railway*, 208 Mass. 589. *Sharkey v. Skilton*, 83 Conn. 503, 507. *Louisville, New Albany & Chicago Railroad v. Bryan*, 107 Ind. 51, 53. *Johnson v. Marshall Sons & Co.* [1906] A. C. 409, 411. *Lewis v. Great Western Railway*, 3 Q. B. D. 195, 206, 213. The finding of the Industrial Accident Board as to this must be sustained; and it must be held that the petitioner is not entitled to double compensation.

2. The insurer contends that no compensation should be allowed for the death of the employee. This is on the ground that the proximate cause of the death was not the injury, but was the septicæmia or blood poisoning which resulted from the bed sore that came in consequence of his confinement to bed. But this contention cannot be maintained. He had sustained a mortal injury, one from which death must sooner or later ensue, a fracture of the spine, with a severance of the spinal cord, which caused not only a complete paralysis of the lower limbs, but a loss of power and sensation below the seat of the injury. He was taken to a hospital, and afterwards was under proper medical care until his death. He was obliged to lie in bed in one position; and by reason of this an extensive bed sore was developed, and this extended and grew worse until it brought about the blood poisoning which was the immediate cause of his death. There

was testimony from a physician that the death resulted from the injury. The finding of the Industrial Accident Board was that a chain of causation, not broken by any new intervening act, connected the injury with the death, and therefore that the death resulted from the injury, the septicæmia caused by the bed sore being a contributory cause.

It is manifest that there was evidence in support of the finding, and it must stand unless it was wrong as a matter of law. But that is not so. As was said in *McDonald v. Snelling*, 14 Allen, 290, 296, "the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues." Nor would it have been material, if that had been found to be the fact, that the bed sore was due to the mistake or the negligence of the physicians acting honestly. *Gray v. Boston Elevated Railway*, 215 Mass. 143. *Sauter v. New York Central & Hudson River Railroad*, 6 Hun, 446. In a case decided by the Court of Appeal under the English workmen's compensation act it appeared that a workman who had met with an accident, though he had recovered from the immediate effects of his injury, had never regained his normal health, but continued to be weak and debilitated. Thirteen months after the accident, he died from bronchitis, following an attack of influenza. It was by reason of the weakened condition to which the accident had reduced him that the bronchitis proved fatal. It was held that the death resulted from the injury. *Thoburn v. Bedlington Coal Co.* 5 B. W. C. C. 128. The same principle was upheld in *Dunham v. Clare*, [1902] 2 K. B. 292, in which the death for which compensation was allowed was brought on by a supervening attack of erysipelas, but was found to have been the result of the preceding injury. See also *Ystradowen Colliery Co. v. Griffiths*, [1909] 2 K. B. 533; *Meyer v. Butterbrodt*, 146 Ill.

131. Such cases as *Daniels v. New York, New Haven, & Hartford Railroad*, 183 Mass. 393, *Snow v. New York, New Haven, & Hartford Railroad*, 185 Mass. 321, *Fairfield v. Salem*, 213 Mass. 296, and *Scheffer v. Washington City, Virginia Midland, & Great Southern Railroad*, 105 U. S. 249, are not applicable here, upon the findings of the Industrial Accident Board.

It follows that compensation rightly was allowed for the death.

3. Compensation also has been allowed under St. 1911, c. 751, Part II, § 11 (amended by St. 1913, c. 696), for the permanent incapacity of both legs. The insurer contends that this was erroneous, because there was no actual injury to the feet or legs themselves, but only to the spine and spinal cord, the paralysis of the lower limbs being due to that injury alone. This presents a very interesting and somewhat close question, which we do not find to have been passed upon by any court. But it is enacted by R. L. c. 8, § 4, cl. 3, that "words and phrases shall be construed according to the common and approved usage of the language," with a provision for technical words and legal terms which is not now material. In common speech the word "injury," as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability. If one by external violence had his optic nerve severed close to the brain, or its function destroyed so as to result in blindness, although nothing whatever had been done to the eyes themselves or to the structures immediately surrounding them, it yet would be said in common speech that his eyes had been injured to the point of uselessness. Whatever part of the human body thus has been made incapable of its normal use, so that practically it has ceased to be available for the purpose for which it was adapted, is certainly "injured," according to the common understanding of men. It would be difficult to say that one whose legs had been paralyzed like those of this employee, if entitled to maintain an action therefor, could not properly describe the injury as having been done to his legs. It seems to us to come within the meaning of the statute. It is a harm done to the legs, a loss or detriment caused to them, something which impairs their soundness and diminishes their value. See 16 Am. & Eng. Encyc. of Law, (2d ed.) 499; 4 Words and Phrases, 3615.

It has been suggested that an injury to a higher part of the spinal cord or to the brain itself might result in a total paralysis of all the bodily organs and so lead to a quadrupling of the additional compensation. But we doubt if that would be so. The injuries specified in clause (a) of St. 1913, c. 696, § 1, once compensated for, it is by no means certain that anything more could be allowed. It at least could be plausibly contended that everything else would have been included; that the provisions of clauses (b), (c) and (d) covered nothing additional, but merely provided for injuries of less severity; and that clause (e) simply included a total incapacity resulting from either one of the causes specified.

4. We are of opinion, however, that the right to an order for the future payment of the special compensation ceases with the death of the person injured. It is a right peculiar to himself, not created for the benefit of his dependents. It is a part of the scheme for special compensation provided by §§ 9, 10 and 11 of Part II of the act. By § 9 provision was made for special compensation for a period of total incapacity for work; by § 10 compensation was fixed for a period of partial incapacity; by § 11, as amended by the act of 1913, additional compensation is given for the total or partial loss or incapacity of certain members of the body. All of these provisions seem to have been made for the personal relief of the injured employee, his dependents being provided for by the compensation to be made for his death. The special compensation takes the place of the wages which but for the injury the employee might have earned. As was pointed out by the Industrial Accident Board in its decision, there is nothing in the language of the act which authorizes the ordering of these special payments for a time after the death of the employee, nor is such a construction required by its phraseology or its apparent purpose. If this were not so, the amounts to be paid to his dependents would be increased proportionately to the quickness with which his death followed the incurring of his incapacity, although these payments were manifestly intended to make up for the loss of his own earning capacity. In our opinion the ruling that this specific compensation should be allowed only during the lifetime of the injured employee was correct.

The question whether, if during his lifetime and upon his own petition this specific compensation had been ordered for a stated

number of weeks and his death had occurred before the expiration of that period, the right thus adjudicated would cease at his death, or whether the payments must be continued until the end of the appointed time for the benefit of his dependents, is not raised here, and of course has not been passed upon.

The result is that the decree of the Superior Court was correct, and must be affirmed.

So ordered.

CHARLESBANK HOMES vs. CITY OF BOSTON.

Suffolk. March 5, 1914. — May 22, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Charity. Tax, Exemption. Words, "Occupied."

It seems, that a corporation, which has no capital stock and is not conducted for profit, no part of the income or profits of whose business can be distributed among members or stockholders, and the object of which is to provide wholesome and sanitary homes for working people and people of small means at moderate cost, is a charitable corporation within the meaning of St. 1909, c. 490, Part I, § 5, cl. 3.

Where a charitable corporation, whose corporate purpose is to provide wholesome and sanitary homes for working people and people of small means at moderate cost, erects on a lot of land belonging to it a large model apartment house, containing besides some general rooms one hundred and three apartments of two, three and four rooms respectively, and these apartments are leased to tenants for small rents, the net income being applied to the charitable purposes of the corporation, the real estate is not "occupied" by the corporation or its officers for the purposes for which it is incorporated within the meaning of St. 1909, c. 490, Part I, § 5, cl. 3, and consequently is not exempt from taxation.

CONTRACT, by Charlesbank Homes, a corporation organized under the provisions of R. L. c. 125, against the city of Boston to recover \$2,965.12, the amount of a tax paid by the plaintiff under protest, which was assessed upon the plaintiff's land and building at the corner of Charles Street and Poplar Street in Boston for the year 1912. Writ dated April 15, 1913.

In the Superior Court the case was submitted upon an agreed statement of facts to *Hardy, J.*, who found for the plaintiff in the sum of \$3,184.78, and ordered judgment accordingly. From

the judgment entered in pursuance of this order the defendant appealed.

K. Adams, for the defendant.

E. H. Ruby, for the plaintiff.

SHELDON, J. We do not doubt that the plaintiff is a charitable corporation within the meaning of St. 1909, c. 490, Part I, § 5, cl. 3. It has no capital stock; it is not conducted for profit; no part of the income or profits of its business can be divided among members or stockholders. Its object is to provide wholesome and sanitary homes for working people and people of small means at moderate cost. Its charter sets out sufficiently the means by which it undertakes to accomplish that object. It comes strictly within the rule of *Franklin Square House v. Boston*, 188 Mass. 409, and *Thornton v. Franklin Square House*, 200 Mass. 465.

But the real estate of a charitable corporation is not always exempt from taxation. Unless purchased for the purpose of removal, which is not the case here, the real estate is so exempt only so far as it is occupied by the corporation or its officers for the purposes for which it was incorporated. *St. James Educational Institute v. Salem*, 153 Mass. 185. *Salem Lyceum v. Salem*, 154 Mass. 15. *Williams College v. Williamstown*, 167 Mass. 505. See *Boston Lodge Order of Elks v. Boston*, 217 Mass. 176. The real estate here in question consists of a lot of land, upon which the plaintiff has erected a large model apartment house, containing besides some general rooms one hundred and three apartments of two, three and four rooms respectively. The apartments are leased to tenants for small rents. The question is whether it can be said that the premises are occupied by the plaintiff within the meaning of that word as used in the statute, or whether the apartments must be held to be in the occupation of their several tenants.

These tenants are not mere lodgers, as was the case in *Franklin Square House v. Boston*, 188 Mass. 409. The object of the corporation was to rent the apartments; it is rent that the tenants pay to the plaintiff. They are strictly tenants; as such, they have an interest in the respective apartments let to them, and they are themselves the occupants thereof. *Mathews v. Livingston*, 86 Conn. 263. And see the note to this case in 31 Ann. Cas.

200. Their right to possession is exclusive, so long as they pay their rent and comply with the other terms of their leases. *Porter v. Merrill*, 124 Mass. 534.

But the plaintiff contends that the word "occupied" in the statute is not used in its natural sense, to import an actual occupation, but merely as a synonym of "used" or "appropriated." It would be hard in any event so to alter the meaning of this word, in view of the rule of construction laid down in R. L. c. 8, § 4, cl. 3. But the contention proceeds upon a misconception of the provisions of St. 1909, c. 490, Part I, § 5, cl. 3. That section first exempts from taxation the personal property of corporations like the plaintiff; then it exempts likewise their real estate, "owned and occupied by them or their officers for the purposes for which they are incorporated;" then it further provides, as a limitation of the two exemptions thus created, that there shall be no exemption of either real or personal property if any of the income or profits is "divided among the stockholders or members, or is used or appropriated for other than literary, educational, benevolent, charitable, scientific or religious purposes." It is with reference to the purpose of an occupation by the corporation or its officers and to the application made of its income that the purpose, the use, or the appropriation is material. But there must be an actual occupation by the corporation or its officers before the purpose of that occupation can be considered, and so are the decisions to which we have referred. Nor do the cases cited by the plaintiff support its contention. In *Mount Hermon Boys' School v. Gill*, 145 Mass. 139, the property which was held to be exempt was in the occupation of the plaintiff, and the question discussed by the court, so far as it bears upon this point, was as to the character of the use and the application made of the products. In *Massachusetts General Hospital v. Somerville*, 101 Mass. 319, the same was conceded to be true, except as to one house, and it was held that it could be found that this was occupied by an employee of the plaintiff in the character of a servant rather than a tenant of the plaintiff, so that all the property was occupied by that plaintiff. The question was not one of occupation, but of the intention of the plaintiff as affecting the character of the occupation. This is true also of *New England Hospital v. Boston*, 113 Mass. 518. The case of *Redemptorist Fathers v. Boston*, 129 Mass. 178,

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decides that not only must there be a present occupation by the corporation or its officers, but that the occupation must be simultaneously for the charitable purposes of the corporation. The case of *Old South Association v. Boston*, 212 Mass. 299, has no bearing upon this point, because there a special act provided for the exemption of both land and meeting house so long as the latter was used for the purposes stated. In *Willamette University v. Knight*, 35 Ore. 33, it was held that land of an educational institution leased for agricultural purposes was not actually occupied for the educational purposes of the institution. The two cases last cited are authorities for our view.

That any net income realized from this property is to be applied to the charitable purposes of the plaintiff is not material. *Chapel of the Good Shepherd v. Boston*, 120 Mass. 212.

Because the real estate upon which the tax was imposed was not occupied by the plaintiff corporation, but was occupied by its tenants, it was not exempted from taxation. The judgment for the plaintiff must be reversed, and judgment must be entered for the defendant.

So ordered.

JOHN McKEEVER vs. WILLIAM L. RATCLIFFE.

Suffolk. March 6, 1914.—May 22, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Agency, Scope of employment. Evidence, Admissions and confessions.

In an action for personal injuries from being knocked down by an automobile of the defendant negligently driven by the defendant's chauffeur, where the only question is whether at the time of the accident the chauffeur was acting within the scope of his employment, there was evidence that it was the duty of the chauffeur to go for the defendant's children at a certain school, that he was permitted to use the automobile in going to his dinner at his boarding place and to a certain shop on his way to the school, that at the time of the accident he had been to his dinner and had stopped at the shop, but that then, instead of driving directly to the school, he took another and a longer route for the purpose of obliging an acquaintance by taking him to a place to which he wished to go, and that, while he was doing this, the accident happened. The chauffeur testified that he never was instructed by the defendant how to go to the school

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and could go there by any route that he chose, that, after the happening of the accident, he told the defendant "the whole story, just the way it was," and that the defendant said that he had the right to be where he was when the accident happened and that there was nothing for him to worry about. *Held*, that the jury could find that this remark of the defendant was an admission by the defendant that, as between him and the chauffeur, the latter properly was driving the automobile at the place of the accident in the performance of his duty to the defendant, and that with this statement there was evidence for the jury that at the time of the accident the chauffeur was acting within the scope of his employment.

TORT for personal injuries sustained on November 10, 1911, when the plaintiff, who was nearly seventy years of age, was crossing Washington Street at or near Boylston Street in the part of Boston called Jamaica Plain, and was knocked down by an automobile owned by the defendant, which was alleged to have been operated negligently by the defendant's servant. Writ dated October 17, 1912.

In the Superior Court the case was tried before *White, J.* The automobile which struck the plaintiff was "owned by the defendant and operated by one Hicks, who was a chauffeur in the general employ of the defendant. There was evidence from which the jury could find that the plaintiff was in the exercise of due care, and that said chauffeur was negligent." The defendant lived in the part of Boston known as Jamaica Plain. Hicks boarded and lodged with one Edward McCarthy. At two o'clock on each of the five school-days of the week, it was the duty of Hicks to be at a certain number in Marlborough Street in Boston, to get the defendant's children who attended school there and to take them home. Going at an ordinary speed it took about twenty minutes to go to the school. At about half past eleven on the day on which the accident occurred Hicks had just got the youngest daughter of the defendant at some place not stated and had taken her to the defendant's house. Hicks then went to McCarthy's and got his dinner. He finished his dinner at about half past twelve, and had an hour and a half within which to go to get the children. He had eaten dinner with McCarthy, and after dinner at half past twelve he took McCarthy from his house to a shop on Green Street where McCarthy, who was a harness maker, had his place of business. The direction in going to the shop on Green Street was directly away from Boston.

As to what happened next Hicks testified as follows: "Mr. McCarthy got out and went into his shop. . . . While I was standing there I was talking to the other man that worked in the shop. A fireman came along, named Lydon; I had a talk with Mr. Lydon. . . . While I was talking with Lydon, he asked me for a ride down the street; I said to him I was going in town, but probably had time enough to take him down a little ways. After that he got in, and I started down Green Street in the direction of Washington. At the time I started, there was on the automobile besides me and Mr. Lydon the other man who was working at [McCarthy's]; he stepped on the running-board and rode down a little ways to Oakdale Street. Lydon hadn't told me just where he wanted to go. I don't remember what was said after that; I intended to turn up one of these streets. . . . Then, after that, I kept going. When I got down to the corner of Green and Washington Streets, nothing was said to me by Lydon or by me to him; I made up my mind I would not go down any further. As a matter of fact, I did take him down Green Street and down Washington, and at some point on Washington Street, I met with an accident. At that time the fireman was in my vehicle, sitting in the back seat. I was on the driver's seat; there was no one else in the automobile; I was operating it, and the accident occurred on Washington Street near Chauncy Place, I was going ten or twelve miles an hour."

Other evidence is described in the opinion.

The judge refused to rule that upon the whole evidence the plaintiff was not entitled to recover, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$2,525. The defendant alleged exceptions, it being stated in the bill of exceptions that "The only question to be determined is whether, at the time of the accident, the said chauffeur was acting within the scope of his employment so that the defendant was legally responsible for his alleged negligent act."

C. S. Knowles, for the defendant.

J. H. Vahey, for the plaintiff.

SHELDON, J. The liability of the defendant for the negligence of Hicks his chauffeur in driving the defendant's automobile depends upon whether Hicks then was acting within the scope of his employment. *Cain v. Hugh Nawn Contracting Co.* 202

Mass. 237, 239. The jury could find that Hicks was permitted by the defendant to use the automobile in going to his dinner at McCarthy's house and thence to McCarthy's shop, on his way to the school on Marlborough Street. *Reynolds v. Denholm*, 213 Mass. 576. But on this occasion, instead of going from McCarthy's shop directly to Marlborough Street by the usual route, he took another and longer route, apparently for the purpose of carrying one Lydon to or toward the place to which Lydon wished to go. It was while driving along Washington Street with Lydon, but in the general direction of the school, that the accident happened.

If these were all the facts, they would show plausible ground for the contention that when Hicks ran into the plaintiff, he was not doing the defendant's work, and was not acting within the scope of his employment, but was going on an independent journey for a purpose of his own, the accommodation of one whom he wished to befriend, and not at that time for the purpose of going to the school to carry the defendant's children home. *McCarthy v. Timmins*, 178 Mass. 378. *Fleischner v. Durgin*, 207 Mass. 435. *Mitchell v. Crassweller*, 13 C. B. 237. *Storey v. Ashton*, L. R. 4 Q. B. 476. In that event, it of course would make no difference that he intended, after having accomplished his own independent purpose, to resume the performance of his duty to his master. But Hicks testified that he never was instructed by the defendant how to go to Marlborough Street, and could go thither by any route that he chose. *Ritchie v. Waller*, 63 Conn. 155. *Patten v. Rea*, 2 C. B. (N. S.) 606. He testified further that after the happening of the accident he told the defendant "the whole story, just the way it was," and that the defendant said that he (Hicks) had a right to be there on Washington Street, that there was nothing for him to worry about. The jury could find that this was an admission by the defendant that, as between himself and Hicks, the latter properly was driving the automobile in this place in the performance of his duty to the defendant. If so, the fact that Hicks had also the purpose of gratifying a private desire of his own in taking the route that he did was immaterial. *Patten v. Rea*, 2 C. B. (N. S.) 606.

In its essential features this case belongs to the class of which

Reynolds v. Denholm, 213 Mass. 576, *Ritchie v. Waller*, 63 Conn. 155, *Whatman v. Pearson*, L. R. 3 C. P. 422, and *Venables v. Smith*, 2 Q. B. D. 279, are examples, rather than to that illustrated by such cases as *McCarthy v. Timmins*, 178 Mass. 378, *Fleischner v. Durgin*, 207 Mass. 435, *Mitchell v. Crassweller*, 13 C. B. 237, and *Storey v. Ashton*, L. R. 4 Q. B. 476.

The case rightly was submitted to the jury, and there is no suggestion that full and correct instructions were not given to them.

Exceptions overruled.

FREDA MALOOF vs. JOHN ABDALLAH.

Suffolk. March 6, 1914.—May 22, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Bond, To dissolve attachment in proceedings by wife for separate support. *Husband and Wife. Marriage and Divorce. Damages. Interest.*

A bond given to dissolve an attachment in a proceeding in the Probate Court on the petition of a wife for separate support under R. L. c. 153, § 33, in which there can be no final judgment for the petitioner, which is conditioned for the payment of whatever final judgment shall be entered, must be construed according to its subject matter to cover the recovery of whatever sums have been ordered to be paid upon the petition.

Under R. L. c. 152, § 35, a divorce obtained by an inhabitant of this Commonwealth in another State, into which he went for the purpose, "for a cause which occurred, if at all, in this Commonwealth while the parties resided here," can have no force or effect in this Commonwealth, and consequently has no effect to end the liability of a husband thus obtaining such a divorce for the separate support of his wife ordered by the Probate Court under R. L. c. 153, § 33.

In fixing the amount for which execution should issue on a judgment for the penal amount of a bond to dissolve an attachment given in proceedings upon the petition of a wife for separate support, the state of affairs at the time of the hearing must be considered. In such a case the husband, as principal on the bond, is liable for the full amount of the sums ordered to be paid by him, less what he has paid already and not exceeding the penalty of the bond with interest, and a surety is liable for the same amount.

In an action on a bond, where a breach of the bond before the bringing of the action has been shown and the amount to which the plaintiff is entitled exceeds the penalty of the bond, execution should be ordered to issue for the amount of the penalty of the bond with interest from the date of the writ.

CONTRACT against one of the sureties on a bond given by the husband of the plaintiff in proceedings in the Probate Court for the County of Suffolk upon a petition of the plaintiff under R. L. c. 153, § 33, for separate support. Writ in the Municipal Court of the City of Boston dated March 24, 1911.

On appeal to the Superior Court the case was tried before *Aiken*, C. J., who found that judgment should be entered for the plaintiff in the penal sum of the bond, to wit, \$1,000, with interest from the date of the writ, and further determined that the sum due and payable in equity and good conscience exceeded the judgment to be entered, and therefore awarded execution for the full amount of such judgment and interest thereon from the date of the writ.

At the request of the parties the Chief Justice reported the case for determination by this court upon the pleadings and his findings of fact, which included the facts stated in the opinion.

C. F. Smith, for the defendant, submitted a brief.

A. A. Schaefer, for the plaintiff.

SHELDON, J. It hardly is denied that this is a valid bond. It was given to dissolve an attachment made upon a petition filed in the Probate Court by the plaintiff, under R. L. c. 153, § 33. It was conditioned for the payment of whatever final judgment should be entered in that action,—which of course must mean whatever sums her husband, the respondent in that petition, should be ordered by the court to pay her for her support. Such an order was made by that court, and was not appealed from by either party. The order remained in full force and effect, except so far as it was modified by a later decree of the Probate Court. Under the statute already referred to we cannot doubt that the defendant is liable upon his bond to pay the amounts due thereunder which have remained unpaid, unless that liability has been in some way discharged. It is true that upon such a petition by a wife against her husband to obtain an order for her separate support no final judgment can be entered in her favor such as that by which ordinary civil actions are terminated. But the bond given to dissolve an attachment made in such a proceeding must be construed according to its subject matter, to support an action for the recovery of whatever sums have been ordered to be paid upon the petition. *Downs v.*

Flanders, 150 Mass. 92. This was the reasoning of the court in *Place v. Washburn*, 163 Mass. 530, and *Hill v. Hill*, 196 Mass. 509. And see *McIlroy v. McIlroy*, 208 Mass. 458. There is nothing inconsistent with this in any of the cases relied on by the defendant.

The defendant contends however that his liability has been ended by the divorce granted to the husband in Nevada. But as to that it is sufficient to say that the judge at the trial found as a fact that the husband, "while an inhabitant of this Commonwealth, went into Nevada for a divorce for a cause which occurred, if at all, in this Commonwealth while the parties resided here." That finding was well warranted, if indeed it was not required by the evidence; and upon that finding the decree of divorce has and can have no force or effect in this Commonwealth, R. L. c. 152, § 35. Whether the decree was void for lack of jurisdiction in the Nevada court, we need not consider. It did not affect the liability upon this bond.

In determining the amount for which execution should issue, the state of affairs at the time of the hearing must be considered. *Brookfield v. Reed*, 152 Mass. 568, 575. Nor can the amount to be paid to the plaintiff be diminished by deducting from the penalty of the bond the amounts which were paid by her husband, the principal in the bond. The condition of the bond, which measures the extent of the defendant's liability, was not to pay \$1,000 less whatever amount the principal should pay, but to satisfy whatever final judgment should be entered. He is liable for the full amount of such judgment, less what has been paid by the principal, and not exceeding the penalty of the bond with interest. That was his agreement.

As there was a breach of the bond before the action was brought, and as the amount to which the plaintiff was entitled at the trial exceeded the penalty of the bond, interest on the latter sum rightly was added. See the cases collected in *Harmon v. Weston*, 215 Mass. 242, 250.

Upon the terms of the report, judgment must be entered for the plaintiff for the penal sum named in the bond, being the sum of \$1,000, with interest from the date of the writ, and execution must be awarded to her for the same amount.

So ordered.

JOHN H. D. WHITCOMB vs. BOSTON DAIRY COMPANY.

CHARLES A. KIMBALL vs. SAME.

G. FRED WILDE vs. SAME.

CHARLES A. DAVIS vs. SAME.

DANA A. FAWCETT vs. SAME.

THOMAS E. MENTZER vs. SAME.

LORENZO SANDERSON vs. SAME.

FRANK PICARD vs. SAME.

Suffolk. March 10, 1914.—May 22, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Milk. Evidence, Presumptions and burden of proof.

In an action of contract for the price of milk sold and delivered, where at the trial the plaintiff has shown that the milk was sold and delivered to the defendant and during a long period was accepted by him without complaint, and where the defendant at the trial has introduced no evidence that R. L. c. 56, §§ 56, 57, was violated by the plaintiff or that the milk furnished by him was not natural unadulterated milk of the quality required by the statute, and the defendant's counsel has made no suggestion to this effect before the close of the evidence, the plaintiff, on this evidence and the presumption of innocence, is entitled to go to the jury, although he introduced no direct evidence that the percentage of milk solids contained in the milk sold by him to the defendant was that required by R. L. c. 56, § 56.

EIGHT ACTIONS OF CONTRACT, each by a different plaintiff, against the Boston Dairy Company, a corporation having a usual place of business in Boston, each action being on an account annexed for milk sold and delivered to the defendant. Writs in the Municipal Court of the City of Boston dated, one on March 11, 1912, and the other seven on March 27, 1912.

The answer in each case was a general denial.

On appeal to the Superior Court the cases were tried together, in groups according to the facts, before *Lawton, J.* The evidence is described in the opinion. At the close of the evidence the defendant in each case asked for five rulings, of which the last three have become immaterial. The first and second were as follows:

"1. Upon all the evidence the plaintiff is not entitled to recover.

"2. Upon all the evidence the plaintiff has not shown that the milk furnished by him was of the standard quality required by R. L. c. 56, § 56."

The judge refused to make these rulings and submitted the cases to the jury, who in each case returned a verdict for the plaintiff in accordance with the amount claimed. The defendant alleged exceptions, including certain exceptions which were not argued and therefore were treated as waived, as stated in the opinion.

The cases were submitted on briefs.

M. J. Sughrue & D. J. Triggs, for the defendant.

F. L. Simpson, O. A. Cunningham & C. W. Wood, for the plaintiffs.

BRALEY, J. The defendant's exceptions to the admission of evidence and to the refusal of the presiding judge to give the third, fourth and fifth requests, not having been argued, are to be treated as waived. It ordinarily would follow that, the sale and delivery of the quantity of milk as charged in each action having been abundantly proved, the defendant in the first three cases would be bound to pay the fair market price at the place of shipment, and in the last five cases the price named in the offer of the company found in the letter of its president to the plaintiff Davis. *Lowe v. Pimental*, 115 Mass. 44. *Zoller v. Morse*, 130 Mass. 267.

But, as the R. L. c. 56, § 56, has defined the percentage of milk solids exclusive of fat necessary for standard milk, and by § 57 has made the sale or exchange of milk below the standard punishable as a misdemeanor, the defendant contends, that in the absence of direct evidence that the milk supplied conformed to the requirements of the statute, its first and second requests that neither of the plaintiffs could recover should have been given.

It is said in *Copeland v. Boston Dairy Co.* 184 Mass. 207, that a contract to sell milk means as a matter of construction a contract to sell milk which fulfills the requirements of the statute, and a delivery of another kind of milk would fail as a matter of description to comply with a contract to sell and deliver milk. And the plaintiff had the burden of proving compliance with the statute. The declaration, however, in each case being a count

upon an account annexed, which, under our system of pleading, contains as to each item the allegations of the common count for goods sold and delivered, it was not demurrable, and the defendant was compelled to answer the merits. *Massachusetts Mutual Life Ins. Co. v. Green*, 185 Mass. 306.

The defense is not that the plaintiffs failed to prove delivery; it is that the sales were not shown to have been of standard milk. The cases of *Miller v. Post*, 1 Allen, 434, and *Libby v. Downey*, 5 Allen, 299, very plainly are distinguishable. In the first case the parties agreed, that the cans used in the sale of the milk had never been sealed as required by St. 1859, c. 206, § 4; while in the second case, where the plaintiff sued for the price of coal that had not been weighed by a sworn weigher and a certificate of the weight delivered to the buyer in conformity with Gen. Sts. c. 49, § 189, the answer stated the specific ground upon which the defendant relied to defeat the plaintiff's right to recover.

Nor are the plaintiffs cast by the rule, that, where a plaintiff cannot make out his claim for either damages or an alleged debt without showing an illegal act on his part, he must fail, he being a transgressor whom the court will not assist. *Bourne v. Whitman*, 209 Mass. 155, 166, 169. *Miller v. Ammon*, 145 U. S. 421. The jury, as the record stands, would not have been warranted in finding that either of them had subjected himself to a criminal prosecution. The presumption of innocence had not been overthrown. *Commonwealth v. Vieth*, 155 Mass. 442. The absence of any evidence or even of a suggestion by counsel for the defendant before the testimony closed, that the statute had been violated, or that the milk, which during a long period had been accepted without complaint, was not natural unadulterated statutory milk, made a *prima facie* case that the milk delivered complied with the statute and was sufficient to send each case to the jury.

The presiding judge properly declined to order verdicts for the defendant, and the exceptions must be overruled.

So ordered.

FRANCIS McGRATH vs. JOHN A. QUINN, executor.

Middlesex. March 10, 1914.—May 22, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Husband and Wife. Waiver. Election.

The filing in the Probate Court in behalf of a surviving husband, who had appeared by counsel to object to the allowance of the will of his wife who died without issue, of a writing stating that "in his behalf we withdraw all objection to proof of the instrument presented . . . and consent that said instrument may be allowed as the last will" of the testatrix upon the executor furnishing a bond in a certain sum with a surety company as surety, the executor having been exempted by the terms of the will from giving a surety on his bond, does not deprive such surviving husband of his right under R. L. c. 135, § 16, after the required bond has been filed and the will has been allowed, to file in the registry of probate a writing signed by him waiving the provisions made for him in the will and claiming such portion of his wife's estate as he would have taken if she had died intestate, and after doing so he may maintain a petition in the Probate Court under R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256, for an order to sell so much of the real estate that belonged to his deceased wife as may be necessary to provide the amount to which he is entitled. In the present case it appeared that the counsel for the surviving husband, when he filed the writing withdrawing objection to the proof of the will, stated to the counsel for the executor that after the proving of the will the surviving husband intended to exercise his right to waive its provisions.

PETITION, filed in the Probate Court for the County of Middlesex under R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256, by the surviving husband of Ellen McGrath, late of Lowell, who died without issue on July 19, 1911, leaving a will by the terms of which her husband, the petitioner, was to receive one third of her property real and personal, to compel the executor of the will to sell real estate that belonged to the testatrix to provide for the payment to the petitioner of \$5,000, the petitioner having filed under R. L. c. 135, § 16, a writing signed by him waiving the provisions made for him in the will and claiming such portion of the estate of the deceased as he would have taken if the deceased had died intestate.

In the Probate Court *Lawton, J.*, made a decree granting the petition. The executor of the will appealed.

The appeal was heard by *Loring, J.* The facts found by him

are stated in the opinion. The justice found that the whole of the estate exceeded the sum of \$5,000, of which \$3,022.31 was personal property. In regard to the writing filed by the counsel for the petitioner, which is described in the opinion, the justice ruled that the words "and consent that said instrument may be allowed as the last will of said Ellen McGrath" were not, especially in the connection in which they were used, equivalent to consenting to the will or to the provisions of the will. At the request of the parties the justice reported the case for determination by the full court.

W. H. Bent, for the respondent.

S. E. Qua, for the petitioner.

BRALEY, J. The testatrix died without issue, and her husband, the petitioner, to whom she devised and bequeathed one third of her real and personal property, appeared by counsel and objected to the allowance of the will when offered for probate. By the provisions of the will the respondent, the executor, was exempted from giving a surety on his official bond. R. L. c. 149, § 3. But at some stage of the proceedings the counsel for the husband filed a writing stating that "in his behalf we withdraw all objection to proof of the instrument presented . . . and consent that said instrument may be allowed as the last will" of the testatrix, upon condition, that the executor furnish a bond in a certain sum with a surety company as surety. The bond having been furnished, and approved, and the will thereupon having been admitted to probate, the petitioner within one year thereafter availed himself of the right given by R. L. c. 135, § 16, by filing in the registry of probate his written waiver of the provisions made for him, and claiming such portion of his wife's estate as he would have taken if she had died intestate. This election ordinarily would entitle him to his distributive share as provided in R. L. c. 140, § 3, cl. 3. *Atherton v. Cortiss*, 101 Mass. 40, 47. He could not claim under the will on one hand, and on the other hand demand his rights as if he were a statutory heir. *Shelton v. Sears*, 187 Mass. 455, 457.

It is, however, contended by the respondent, that the withdrawal of further opposition to the probate of the will coupled with the condition, that the executor should give bond with a surety, constituted an assent to the testamentary disposition of

her property, which deprives him as the surviving husband of the right of waiver. The allowance of a will propounded for probate with the consent of the surviving spouse, who has appeared as the sole contestant, and the right to waive its provisions for his or her benefit are distinct. *Bunnell v. Hixon*, 205 Mass. 468. If the petitioner had indorsed on the will his assent to its terms, he would not thereby have relinquished his right to take his distributive share as if his wife had died intestate. *Bunnell v. Hixon*, 205 Mass. 468.

A waiver moreover is the intentional relinquishment of a known right. *Metropolitan Coal Co. v. Boutell Transportation & Towing Co.* 185 Mass. 391, 397. And the question is one of fact. *Taylor v. Cole*, 111 Mass. 363. If we recur to the wording of the paper of withdrawal, the language previously quoted signifies, that all objections to proof of the will were withdrawn. It was on its face an arrangement for the termination of the contest over the petition for the probate of the will. But, if the conditional stipulation as to the bond raises any ambiguity, the intention of the parties may be shown by extrinsic evidence, and all doubt is removed by the testimony of counsel who acted for the executor, that the petitioner's counsel when the agreement was entered into stated to counsel then acting for the executor, that after the probate of the will the petitioner intended to exercise his statutory right of election. *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104. *DeMontague v. Bacharach*, 187 Mass. 128, 132, 133. *Wright v. Anderson*, 191 Mass. 148.

The present petition to enforce his rights having been properly brought in accordance with R. L. c. 135, § 16, to require the respondent to sell so much of the real estate of the testatrix as may be necessary to give him the amount to which he is entitled under R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256, the decree of the Probate Court ordering a sale, from which the respondent appealed, should be affirmed.

So ordered.

NATIONAL BANK OF NEWBURY *vs.* CHARLES S. WENTWORTH.
SAME *vs.* SAME.

Suffolk. March 12, 1914.—May 22, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & CROSBY, JJ.

Bills and Notes, Negotiability.

The words "as per terms of contract," written after the words "Value received" on the face of a promissory note by the maker before its delivery, do not destroy the negotiability of the note or make its payment to a holder in due course conditional upon the performance of a contract intended to be referred to by the maker.

TWO ACTIONS OF CONTRACT between the same parties, each on an alleged negotiable promissory note signed by the defendant as maker in the name "Charles S. Wentworth & Co.," payable to the order of the Pleasant River Lumber Company and indorsed by that company by its treasurer. Writ in the first case in the Municipal Court of the City of Boston dated October 31, 1910, and writ in the second case in the Superior Court dated May 13, 1911.

The first case having come to the Superior Court by appeal, the two cases were tried together in that court before *Raymond, J.*, without a jury, upon the report of an auditor and oral evidence.

The note sued upon in the first case was as follows:

"\$1000.00

Boston, September 7, 1910.

On October 15th after date we promise to pay to the order of Pleasant River Lumber Co. One thousand and 00/100..... Dollars, Payable at 70 Kilby Street, Boston.

Value received as per terms of contract.

Due October 15.

Charles S. Wentworth & Co."

[Indorsement]

"Pleasant River Lumber Company,

A. W. Silsbee, Tr."

The note sued upon in the second case was identical in form and language with the one printed above, except that the time of payment was "November 15th after date" and the amount

was \$5,000. The words "as per terms of contract" in both notes were in the defendant's handwriting.

The defendant set up and relied upon the defense that at the time the note was indorsed and delivered to the plaintiff by the Pleasant River Lumber Company, that company had made with the defendant an agreement in writing dated March 15, 1910, by which it agreed to deliver to the defendant a certain large amount of lumber, that it failed to deliver the lumber as agreed and on October 18, 1910, was adjudicated a bankrupt, and that the notes were not negotiable but were made conditional on the performance of the contract by the words "as per terms of contract," which the defendant testified were written by him on both of the notes at the time they were made.

At the close of the evidence the defendant asked the judge to rule that the notes were not negotiable and that judgment should be ordered for the defendant. The judge refused to make these and other rulings requested by the defendant, and ruled, as requested by the plaintiff, that the defendant's liability was to be determined under the provisions of the negotiable instruments act, R. L. c. 73, §§ 18 *et seq.*, that the plaintiff was a "holder in due course" within the meaning of that phrase as used in the act, that the notes were negotiable instruments as defined in the act, containing an unconditional promise to pay a sum certain in money at a fixed future time, that the words "as per terms of contract" did not relate to the promise to pay, but either related to the consideration or constituted a statement of the transaction which gave rise to the instruments, and therefore did not render the notes non-negotiable. The judge further ruled that upon all the evidence the plaintiff was entitled to recover the amounts of both the notes with interest from the dates of their maturity.

In accordance with these rulings the judge found for the plaintiff in each of the cases, and at the request of the parties reported the cases for determination by this court, it being agreed, that if the notes in suit were held to be negotiable instruments, or in case they should be held to be non-negotiable instruments but that the defense of breach of contract was not available to the defendant, judgment should be entered for the plaintiff for the several amounts of the notes with interest from the maturity of

each and costs, and that, if the notes were held to be non-negotiable instruments and the defense of breach of contract was available to the defendant, the cases should be recommitted to the Superior Court for such action as was just and proper.

A. Sanford, for the defendant.

W. M. Stockbridge, for the plaintiff.

BRALEY, J. We assume, as the counsel for the respective parties have assumed at the argument and in their briefs, that the promissory notes in suit were delivered to the payee in this Commonwealth and are governed by our negotiable instruments act found in the R. L. c. 73. *Nashua Savings Bank v. Sayles*, 184 Mass. 520, 522. *American Malting Co. v. Souther Brewing Co.* 194 Mass. 89.

The plaintiff bank is the indorsee, and the presiding judge was warranted upon the evidence in finding, that it is a holder in due course unless the words "as per terms of contract" written by the defendant on the face of each note after the words "Value received" make his promise as maker conditional upon the performance by the payee of the preceding contract between them appearing in the record for the sale and shipment of lumber. The defendant urges, that, the words having been placed upon the notes before delivery, the original parties must have intended to incorporate this contract, and that negotiability is lacking, because a sum certain is not payable at a time fixed in the future. *Costello v. Crowell*, 127 Mass. 293. R. L. c. 73, § 18, cl. 3. If the words had been, "subject to the contract for lumber," or even "subject to the contract," the principle invoked would have been applicable. The notes would not have been the defendant's unconditional promise to pay a definite sum. *Hubbard v. Mosely*, 11 Gray, 170. *American Exchange Bank v. Blanchard*, 7 Allen, 333. *Sloan v. McCarty*, 134 Mass. 245. But, while the defendant doubtless intended to guard against the payment of money for which in the future he did not receive an equivalent, and the payee has gone into bankruptcy, the language used does not affect the payment of the amounts shown by the notes. By their position, the words well might lead the plaintiff, who is not charged with actual notice, to understand that they were not to be disconnected and applied to an independent outstanding agreement by which the promise was to be modified or restricted,

but that they referred solely to the consideration for which the notes were given. R. L. c. 73, § 69. We are unable consequently to distinguish the case at bar from *Taylor v. Curry*, 109 Mass. 36, where the phrase relied on to destroy negotiability was, "for value received. On policy No. 33,386." It was said by Chief Justice Chapman in delivering the opinion of the court: "The words . . . do not express any contingency as to the payment of the notes, or refer to any fund out of which they are to be paid, but appear to refer to the consideration for which they were given. Such a reference may be for mere convenience, or for any other reason, but it cannot be interpreted as a modification of the promise." See also *Chicago Railway Equipment Co. v. Merchants' National Bank*, 136 U. S. 268, 283, 285; *Jury v. Barker*, El., Bl. & El. 459. By the terms of the report judgment is to be entered for the plaintiff for the amount of each note with interest from maturity and costs.

So ordered.

MARY A. RIPLEY & others vs. JOHN F. BROWN & others,
executors & trustees, & another.

Norfolk. March 13, 1914.—May 22, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & CROSBY, JJ.

Probate Court, Appeal. Charity. Trust, Validity. Equity Jurisdiction, Bill for instructions. Words, "Aggrieved."

A trustee under a will purporting to create a public charitable trust is a "person who is aggrieved," under the provisions of R. L. c. 162, § 9, by a decree of the Probate Court declaring the trust invalid, and may appeal therefrom although none of the trust provisions of the will are for his benefit.

A provision of a will gave to trustees \$50,000, to which were to be added sums amounting to \$33,000 on the deaths of certain persons who were to enjoy the income thereof during their lives, and directed the trustees to accumulate the income until, with or without contributions from others interested in the testator's plan, the entire sum should equal \$100,000, when the trustees were to build and maintain a temple devoted to non-sectarian worship of Christ. There were further provisions as follows: "Should the conditions of this bequest . . . be in any way violated and not redeemed within a reasonable time (one year)" the trust fund and the temple property, if built, was to be given to

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an "Industrial school and home," in which the teachings of Christ were to be taught, to be maintained for poor young men who should "show evidence of their worthiness satisfactory to the Trustees." If, when the sum of \$100,000 was accumulated, there was no "spirit or desire among the people" for either the temple or the industrial school and home, the trustees were directed to permit the fund to accumulate for fifty years or until the entire fund equalled \$500,000 when the income should be devoted to "the deserving poor of" Boston, other than in the maintenance of almshouses, and no deserving poor from outside the city were to be turned away if there was any of the income "in the Treasury to help their needs." More than eighteen years after the allowance of the will the heirs and next of kin of the testator sought to have the trust declared void. It appeared that the accumulated fund amounted to about \$22,000, which had been applied in no way by the trustees. *Held*, that the provisions constituted a valid public charity, and were not subject to the rule against perpetuities; and that the duty of the trustees when the specified fund had been accumulated might be determined upon a petition for instructions filed by them at that time.

BILL IN EQUITY, filed in the Probate Court on October 24, 1911, by the heirs at law and next of kin of Jonathan Mann, late of Milton, against the trustees under his will and the Attorney General, praying that the trust attempted to be established by article 14 of the will, quoted in the opinion, be declared void and that the property held by the defendants by virtue of that article be declared to belong to the plaintiffs.

The will, as modified by a compromise agreement not affecting the terms of article 14, was allowed on April 5, 1893.

The case was heard in the Probate Court by *Flint, J.*, who made a decree granting the prayers of the bill.

The defendants appealed. The plaintiffs moved to dismiss the appeal of the trustees on the ground that they had "no legal or financial interest in the subject matter of said bill," and were "not such parties as have a right by law to appeal."

The case was heard in this court by *Brale, J.*, who found "that the plaintiffs are all the heirs at law or next of kin of the testator; that the inventory returned by the trustees shows only \$31,876.26 of personal property, and the last account filed by them shows a balance in their hands of \$21,964.58, which may be increased by the principal of other trusts under the will upon the death of the beneficiaries for life. No temple has been built or school founded, as called for by the fourteenth clause."

The single justice reserved the case for determination by the full court.

F. T. Field, for the executors and trustees, was not called upon.

L. R. Eyges, Assistant Attorney General, for the Attorney General.

T. Eaton, for the plaintiffs.

BRALEY, J. It is the duty of the trustees, in whom the legal title properly vested, to administer the provisions of the will as directed by the testator unless they are declared invalid by a court of competent jurisdiction. *Hall v. Cushing*, 9 Pick. 395. *Codman v. Brigham*, 187 Mass. 309, 314. And while, if no appeal had been taken, they would be protected by the probate decree setting aside the clause in question and establishing a resulting trust in favor of the heirs to whom the moneys forming the trust fund will be paid, nevertheless, they were persons "aggrieved" within the meaning of R. L. c. 162 § 9, and their appeal, as well as the appeal of the Attorney General, is properly before us. *Adams v. Adams*, 211 Mass. 198. *Whitwell v. Bartlett*, 211 Mass. 238. *Burroughs v. Wellington*, 211 Mass. 494. *Minot v. Attorney General*, 189 Mass. 176.

But if the motion to dismiss cannot be granted, the principal question discussed is whether the fourteenth article, which is not affected by the agreement of compromise, created a good public charity. It reads as follows: "I give, devise and bequeath to my said trustees the sum of Fifty thousand dollars to which shall be added after the death of my wife Betsey Mann Fifteen thousand dollars, after the death or marriage of Emma A. Leeds twelve thousand dollars, after the death or marriage of Carrie S. Leeds, six thousand dollars, (see Articles one, two and three,—of this my last will and testatment, to which this refers.) These amounts combined making eighty-three thousand dollars shall be held in trust by my said trustees and kept invested in accordance with their best judgments the income and profits thereof shall be added semi-annually to the Principle until it shall amount to the sum of one hundred thousand dollars, or until a society shall be formed who will contribute a sum equal to said eighty-three thousand dollars and its accumulated interest to make the same amount at which time the said one hundred thousand dollars together with the same amount (or more) that may be contributed by said society (if any such shall be) shall be devoted to the building and maintaining of a Temple that shall be consecrated

to that Christ who has been revealed unto us in the New Testament as having been born of woman. Therefore no Theory is called for. Said Temple, the walls thereof shall be constructed of Granite and located in the City of Boston, Mass. The name thereof shall be the temple of Christ, no sectarianism or worldly matters shall be taught or preached within the walls of said Temple, the Preachings and Teachings shall be to the praise and glory of Christ and that which pertains to the eternal happiness or misery of the souls of the children of men, in the spirit world, *and only this* whereby this Temple shall not be desecrated neither in any way diverted from the Praise and Glory of that Christ who gave his life whereby the children of men should meet him in the spirit world if they would, and be eternally happy, may all those who have a desire to be with a greater God than Christ (if any such there be) try and conform to this reasonable request by adopting the words of Ruth and Naomi, and say unto Christ whither thou goest I will go where thou lodgest I will lodge. Thy people shall be my people. Thy God my god. Should the conditions of this bequest of Article 14 in this my last will and testament be in any way violated and not redeemed within a reasonable time (one year) then all the property both principle and interest, together with the Temple and all its furnishings (if already built) shall be forfeited, surrendered, given up, and conveyed to an Institution to be then founded to be called the Industrial School and Home, and its maintenance for Poor young men, and all the Religious teachings that shall be taught in this Institution shall be the same as taught by Christ while on earth to the rich and to the poor, and every Inducement shall be held out to those young men to obey the Teachings of Christ to whom this Institution shall be consecrated. If the before named Temple has not been built then a building or buildings commensurate with this calling shall be built with Granite walls and such accommodations within as shall be found necessary by my Executors, Trustees (both being the same). It is the design of the Legator should an Institution be founded that different employments should be learned most suitable for the mind and the cultivation thereof, whereby such young men may become good and Industrious servants of Christ, and for the children of men. After they shall have enjoyed the benefits of this Institution for

Two or more years and have been faithful a reward shall be paid to each of them of Two hundred dollars and such other rewards as shall be thought proper by the Trustees of the aforesaid Institution. The Trustees, Executors of this my last will and testament shall have full powers over this Institution and also the same powers over the before named Institution to be called the Temple of Christ should it have preceded the Institution last named in this my last will and testament. All young men who may have a desire to enter said Institution the Industrial School and Home for poor young men (should it ever be founded) must show evidence of their worthiness satisfactory to the Trustees thereof to be admitted. When the aforesaid eighty-three thousand dollars with accumulated interest shall amount to one hundred thousand dollars and there shall appear to be no spirit or desire among the people to have such Temple built and consecrated to Christ as shown in article fourteen (14) of this my last will and testament, neither a spirit or desire to have founded the Industrial school and home for poor young men who shall be found worthy of such home; Then the trustees of this my last will and testament shall continue to keep the said one hundred thousand dollars invested in accordance with their best judgments adding all income and profits thereof to the principle for the term of Fifty years, or until it shall amount to Five hundred thousand dollars at which time the income and profits thereof shall be appropriated and paid to the deserving poor of the City of Boston, Mass. while time shall remain. No deserving poor outside of the City shall be turned away if there be Funds from the income thereof in the Treasury to help their needs; should this Bequest before mentioned in Article 14 be finally appropriated to this use, it is not the will of the Testator that it should be appropriated to the maintenance of Almshouses, but to help the very deserving poor who try to help themselves."

The principal objects which may be promoted by charitable gifts so recently have been pointed out that whether the trust is valid is very nearly settled by *Molly Varnum Chapter D. A. R. v. Lowell*, 204 Mass. 487, 492, 493, 494, and cases cited; *New England Sanitarium v. Stoneham*, 205 Mass. 335, 341, 342; *Little v. Newburyport*, 210 Mass. 414; and *Chase v. Dickey*, 212 Mass. 555. To endow or build a church for the worship of Christ, or

an industrial school and home with spiritual instruction for poor young men, or to give a fund the income of which shall be applied for the relief of the deserving poor of a designated municipality, constitutes a good charitable trust. *Going v. Emery*, 16 Pick. 107. *Morville v. Fowle*, 144 Mass. 109. *Farrigan v. Pevear*, 193 Mass. 147. *Odell v. Odell*, 10 Allen, 1. The general intention of the testator is clearly expressed and his charitable purposes are definite. If by the administration of the trust an indefinite number of persons will be benefited, indefiniteness of the recipients is a distinguishing feature of a public charity. *Weber v. Bryant*, 161 Mass. 400, 403.

While nearly twenty-one years have elapsed since the will was admitted to probate, and the fund as shown by the last account of the trustees is little more than a quarter of the amount provided by the testator for the temple and the school, yet the provision for accumulation is not invalid even if the period may run far beyond the time prohibited by the rule against perpetuities. *St. Paul's Church v. Attorney General*, 164 Mass. 188, 204. *Codman v. Brigham*, 187 Mass. 309. The testator contemplated that many years necessarily must follow before either the temple or the school could come into existence upon an endowment sufficiently ample for their successful establishment.

If at the termination of the first period of accumulation the trustees are in doubt whether the trust for the temple can be administered as he directed under the conditions then existing, they should apply for further instructions. It will then be within the power of the court of probate, or of this court, unless their jurisdiction is changed, to determine whether there is any public demand for the temple or the school, and to decree whether the fund is sufficient for its founding and maintenance, or whether the fund should be applied in aid of the deserving poor, and to frame a scheme accordingly, or whether a further accumulation for fifty years should be decreed, or until the fund amounts to "Five hundred thousand dollars," before the third mode is adopted. *St. Paul's Church v. Attorney General*, 164 Mass. 188. *Richardson v. Mullery*, 200 Mass. 247. *Grimke v. Attorney General*, 206 Mass. 49.

The motion to dismiss is overruled, and the decree appealed from must be reversed and the petition dismissed.

So ordered.

ARTHUR D. MURPHY vs. WILLIAM B. LAWRENCE & others,
executors.

Middlesex. March 20, 1914. — May 22, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Devise and Legacy. Words, "Domestic servants."

A testator who owned an estate consisting of a house and stable, with large grounds, and who kept horses and carriages and an equipped stable and employed a "foreman," a coachman, a "saddle horse man" and a "stableman or groom" who did not live in the house, and two women, who lived at the house and who served him as cook and second girl respectively, by his will provided, in the order named, for his wife and children, some more distant relations of himself and his wife, some persons not relations, and then gave \$5,000 each to the foreman, the coachman, the second girl and the cook. He then provided as follows: "I also give \$5,000 to each of my domestic servants, other than those named in the two preceding Articles [the cook and the second girl], who shall be in my service at my decease and who shall have been in such service for the five years immediately preceding my death." The groom, who had been in the service of the testator for the five years specified, brought an action against the executor of the will for a legacy under the quoted article of the will. *Held*, that the action could not be maintained, because the groom was not one of the testator's "domestic servants" within the meaning of the will.

CONTRACT, against the executors of the will of Samuel C. Lawrence, late of Medford, for a legacy which the plaintiff alleged was given to him by the provision of the will of the defendants' testator quoted in the opinion. Writ dated October 10, 1913.

The case was heard by *Hardy, J.*, without a jury. The entire will, with codicils, covered about forty-eight typewritten pages. Material portions of it are described in the opinion. Such of the judge's findings of fact as are material also are stated in the opinion. The judge refused to rule that the plaintiff was one of the testator's "domestic servants," within the meaning of the provision of the will quoted in the opinion, found for the defendants, and reported the case for determination by this court, judgment to be entered for the defendants if his rulings and findings for the defendants were correct, and otherwise judgment

to be entered for the plaintiff for \$5,000 and interest from the date of the writ.

W. R. Bigelow, (J. W. Brennan with him,) for the plaintiff.

F. Ranney, (T. Allen, Jr., with him,) for the defendants.

HAMMOND, J. The thirty-seventh article of the will is as follows: "I also give five thousand dollars to each of my domestic servants, other than those named in the two preceding Articles, who shall be in my service at my decease and who shall have been in such service for the five years immediately preceding my death." The question is, was the plaintiff a "domestic servant" within the meaning of that term as thus used by the testator?

It is well to examine the whole will, especially the clauses preceding the clause in question, to see the path travelled by the mind of the testator on the way to this clause.

His mind is first upon his wife and children, and he makes provision for them. He next thinks of the more distant relatives of himself or of his wife, and he makes certain provisions for some of them. Then follow bequests to certain persons who are not shown to be relatives. Having gone over these he comes to another class of legatees, namely, those bearing the relation to him of employee or servant. He had then an estate, consisting of a house and stable, with large grounds; and he kept horses and carriages and the usual articles of stable furniture and utensils. The servants employed at this establishment consisted, at least, of Sherman, the coachman, a "saddle horse man," and the plaintiff who, as the trial judge has found, was "engaged in the employment of the testator as a stableman or groom, whose duties were principally in connection with the care of the horses and at the stable," and the two female servants in the house, who were sisters, one serving as cook and the other as "second girl or waitress." These two sisters were the only servants then or thereafter living in the house up to the time of the testator's death.

He first thinks of Daniel Spillane, his "foreman" (whether at the homestead establishment or elsewhere does not appear), then of Sherman the coachman, to each of whom he gives five thousand dollars; then (after two bequests to persons not servants) of the second girl, Mary Ann Kelley, and of the cook, Catherine Kelley, to each of whom he gives \$5,000. in articles

numbered thirty-five and thirty-six. And then comes the clause in question.

Before this clause he had specifically named Sherman the coachman, "who generally slept in the stable in a room fitted up for him," and when on duty "wore the livery of the testator," and the two Kelley sisters. In writing this clause it occurs to him that some one might think that as the sisters were clearly domestic servants they would be entitled, if at the time of his death they had been in his employ five years, to an additional legacy of five thousand dollars each. He therefore excludes them for the operation of this clause. He makes no mention however of Spillane, the foreman, or of Sherman, the coachman. It is manifest that in framing this clause the testator was thinking only of servants of the same general class as the Kelley sisters, that is, persons whose chief or only duty was in the house, and that only such a person was regarded by him as a domestic servant within the meaning of the clause. The duties of the plaintiff as found by the trial judge were not of that kind, and upon such findings it follows as matter of law that the plaintiff's case falls. The plaintiff was not entitled to either of the rulings he requested.

Several cases have been cited by counsel for the plaintiff where language more or less similar to that of the clause in question has been construed by the court. Without speaking of them in detail it is sufficient to say that they throw but little, if any, light upon the interpretation to be given to this clause in this will. Much depends upon the circumstances of each case. Nor is the conclusion to which we have come inconsistent with the definition of the word "domestic" as given in the lexicographies.

In accordance with the terms of the report the order is

Judgment for the defendants.

ROSE DANOVITZ vs. BLUE HILL STREET RAILWAY COMPANY.

SAMUEL DANOVITZ vs. SAME.

Suffolk. March 25, 1914. — May 22, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Negligence, Street railway.

Where, at the trial of an action against a street railway company for personal injuries received by a passenger upon an open electric street car of the defendant, as he was alighting from the car and was grasping the ironwork at the end of a seat, by the seat being turned over upon his wrist, there is evidence tending to show that the seat was turned over by one of a turbulent and boisterous crowd who were attempting violently to get upon the car, that the presence of such a crowd at that place and time of day was not unusual and was likely to result in injury to passengers alighting from cars, and that the defendant's employees had not attempted to do anything to protect the plaintiff, a verdict for the plaintiff is warranted.

TWO ACTIONS OF TORT, the first action being for personal injuries received, as the plaintiff was leaving an open electric street car of the defendant at Mattapan Square in Boston, by a seat being turned over upon her hand; and the second action being by the husband of the plaintiff in the first action for consequential damages. Writs dated August 21, 1912.

In the Superior Court the cases were tried together before *Fessenden, J.* Material facts which the plaintiff's evidence tended to prove are stated in the opinion. There also was evidence tending to show that, as the plaintiff was on the running board of the car and before she was injured, the conductor took the trolley from the wire, causing the lights to go out in the car and making the car dark.

At the close of the plaintiff's evidence, the defendant rested, and asked the judge to give the following, among other rulings:

"1. That upon all the evidence the plaintiffs cannot recover.

"2. That there is no evidence of any negligence on the part of the defendant's servants and agents as alleged in the declarations.

"3. That there is no evidence of any unusual violence or boisterousness of the passengers waiting to get on the car for which the defendant would be responsible in these actions."

"5. If the seat was turned over by some passengers causing injury to the plaintiff Rose Danovitz, for such an act under the circumstances of this case the defendant is not responsible.

"6. There is no evidence that the crowd was of such a kind and nature as the defendant might reasonably anticipate would be violent or boisterous so as to provide any more safeguards than were usual and customary at such a place."

"8. There is no evidence tending to show that seats were turned over in such a dangerous manner by passengers on this or previous occasions as to make it incumbent upon the defendant to furnish employees at every seat to prevent their being turned over.

"9. There is no evidence which would justify the jury in finding that passengers attempting to board the car were authorized to turn over seats or that whoever turned over the seat in this instance was authorized to do so.

"10. If the jury find that the turning over of the seat was the unauthorized act of some person not in the employ of the defendant street railway company the plaintiffs can not recover in these actions.

"11. That upon the evidence of the plaintiff and her witnesses there was no jostling or crowding upon the car or acts of boisterousness on the part of the crowd that would justify the defendant in anticipating that this seat would be turned over and injure the plaintiff Rose Danovitz."

These rulings were refused.

As to the removal of the trolley by the conductor, the judge charged the jury as follows: "Further, it is said that the conductor took the trolley line and put that around while she was getting off, and that as she was getting off, the trolley having been taken off, it made it dark inside the car. She grabbed hold of this so that she would not fall. Well, what then? That is not the proximate cause of this trouble. I rule that as a matter of law. But it is a circumstance which you can take into account and use. The suggestion from the plaintiff, as I understand it, is that there were numbers of people, and that it had been so before; that they were in a hurry to get on, and that they pushed to get

on, and that they would turn over the seats, they had done so before, and that the turning of the trolley around there had turned off the light, and that it left it dark, so that she could not see, and the persons there would not see her hand, and they threw over the seat and hurt her hand that way. Is that so? Let us examine that. It would not be fair for me to state that and say to you therefore you must find so. It is for you to consider that. Did the turning of the trolley around put out the lights? There is no question about that, that it did put out the light in the car. But did that leave them in such darkness, did it leave it so dark as to play any part in this injury?"

No exception was taken to the charge. The jury found for the plaintiff in the first action in the sum of \$175, and for the plaintiff in the second action in the sum of \$46; and the defendant alleged exceptions.

The cases were submitted on briefs.

J. T. Connolly, for the defendant.

G. P. Beckford, for the plaintiffs.

HAMMOND, J. As the case of Samuel depends upon that of Rose, we will discuss only the latter.

Upon the evidence the jury might have found that the plaintiff, while alighting from the car in the exercise of due care, was injured by the turning of a seat of the car upon her wrist; that the seat was turned by some one who was trying to get upon the car; that this person was one of a turbulent and boisterous crowd of persons who were violently attempting to get upon the car; that the presence of such a crowd at such a time was not unusual and was likely to result in injury to passengers alighting; that the danger was such that the defendant reasonably might be expected to foresee it and was bound to the exercise of due care to prevent it. They might further find that there was an utter failure on the part of the defendant's servants and agents to do anything whatever to protect the plaintiff and that for that reason the defendant failed in the duty it owed to the plaintiff.

The case, though close on the point of the defendant's negligence, must stand in the class with *Glennen v. Boston Elevated Railway*, 207 Mass. 497, *Morse v. Newton Street Railway*, 213 Mass. 595, and other similar cases. *Collins v. Boston Elevated Railway*, 217 Mass. 420.

No error is shown in the manner in which the trial judge dealt with the requests presented by the defendant. The case was rightly submitted to the jury.

In each case therefore, the order is

Exceptions overruled.

AGNES CONNORS vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 25, 26, 1914.—May 22, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Negligence, Employer's liability, Elevated railway.

At the trial of an action under St. 1909, c. 514, § 127, cl. 3; § 129, against an elevated railway company for causing the death of a workman of the defendant who was run over by an elevated train while he with others was engaged in work upon the defendant's apparatus on the elevated tracks, where the declaration alleged that the death was caused by negligence of a motorman of the elevated train in failing to warn the workman of the train's approach and in running the train at a reckless and excessive rate of speed, there was evidence tending to show that during the progress of the work it was necessary for the workmen to leave the work and cross a track to a platform every time a train passed on that track, that trains sometimes passed as often as every three minutes, that for about five weeks while the work was going on the custom had been for a foreman, or, in his absence, one of the workmen, to proceed along the track to a point at least one hundred and fifty feet away, where trains approaching at a distance of seven hundred feet could be seen, and to blow a whistle when a train came, and that no one ever before had failed to get out of the way when the whistle was blown; that on the occasion in question a fellow workman gave such a warning of the approaching train, that all the other workmen left the track in ample time but that the plaintiff's decedent for some reason unexplained by the evidence remained sitting on the rail with his back to the train; that, as or just before the train passed him, the man who had signalled motioned to the motorman, intending to warn him, but instead gave the trainman's signal that meant "go ahead," that the train then was going twenty miles an hour and immediately slowed down and pushed against the decedent, causing him to fall from the track to the street and to be instantly killed. *Held*, that there was no evidence of negligence on the part of the motorman.

Twenty miles an hour is not a reckless or excessive rate of speed for the running of an elevated train around curves under ordinary conditions.

TORT, originally by Francis T. Leahy, administrator of the estate of Patrick J. Connors, the writ and declaration afterwards being amended, as stated in the opinion, so that the action was

by the mother and sole next of kin of Connors to recover under St. 1909, c. 514, § 127, cl. 3; § 129, for his death while in the defendant's employ. Writ dated January 21, 1911.

In the Superior Court the case was tried before *Keating, J.* There were but two witnesses, the plaintiff and one Shambler. The evidence is described in the opinion. At the close of the plaintiff's evidence, the defendant rested and asked that a verdict be ordered in its favor. The request was refused. There was a verdict for the plaintiff in the sum of \$1,500; and the defendant alleged exceptions.

F. M. Ives, for the defendant.

F. T. Leahy, for the plaintiff.

CROSBY, J. This action originally was brought by the administrator of the estate of Patrick J. Connors to recover for his conscious suffering and death. Afterwards, by amendment, Agnes Connors, mother of the intestate and his sole next of kin, was substituted as the plaintiff. The amended declaration contained five counts. At the trial the plaintiff waived the first, second and fourth counts, the presiding judge directed a verdict for the defendant upon the fifth count, and the case was submitted to the jury on the third count, which was for the death of the decedent alleged to have been caused by the negligence of the motor-man of an elevated train, under St. 1909, c. 514, § 127, cl. 3. The decedent Connors was instantly killed, and his mother as dependent next of kin seeks to recover under the third count. St. 1909, c. 514, § 129.

For five or six weeks before September 15, 1910, the date on which Connors was killed, he and three other men, together with a foreman named Martin, had been in the employ of the defendant, painting the compressed air pipe which extended outside the guard rail of the south bound track on the elevated structure between the North Station and Northampton Street in Boston. As the compressed air pipe was outside the guard rail for the south bound track, the men while at work were obliged to get up and cross the track to the platform which extended between the north bound and south bound tracks whenever a train passed, as there was no room for them to stand on the outside of the elevated structure. One of the men employed at this work, John H. Shambler, who was the only witness to the accident that

was called, testified in part: "During these five or six weeks preceding the day of the accident, it had been the custom for Martin, the foreman, or if Martin had business elsewhere, for one of the four remaining men, to proceed a distance of from one hundred and fifty to two hundred and fifty feet to the north of the place where the men were working, with a shrill whistle, known as a derrick whistle. Upon the approach of a train the man with the whistle would blow upon it as a signal to the men who were working in the path of an oncoming train that the train was coming and they were to get up and out of the way. When Martin was there, Martin always blew the whistle. When he was not there he would give it to some one of the other four, and at times the deceased had been the man who blew the whistle to warn the others to get out of the way." The witness Shambler, at the time of the accident and for about two hours previously, had been in charge of the whistle. Shambler testified that just before the accident he was standing between the rails so that he could see trains coming from the direction of the North Station, a distance of about seven hundred feet, and could see the men at the same time. The evidence showed that there was a curve in the track as trains approached the place where the men were at work; that the distance from the place where Shambler stood to the place where the men were working was from one hundred and fifty to two hundred feet, and that Connors was farthest to the south. Shambler testified that when the train which struck Connors was from two hundred to five hundred feet away from him, he (Shambler) blew his whistle three or four times and then went upon the platform; that when he was on the platform he noticed that the two men nearest to him had crossed the track to the platform, but that Connors was still sitting on the guard rail with his back to the approaching train, "in the usual position he took when working, but did not appear to be moving." This witness further testified that when the train was "pretty near abreast" of him, he motioned to the motorman to blow his whistle. On cross-examination he testified that he gave this signal when the train was about sixty or seventy feet from him; that he could not say whether the motorman blew his whistle or not; that the train was running at the rate of about twenty miles an hour, and did not begin to slow down until after it had passed the witness.

The evidence showed that the train slowed down, but struck Connors, who did not move, and pushed him along a short distance, when he fell to the street below. Shambler also testified that since the accident he had learned that the signal he gave to the motorman to blow his whistle was really a motion which in railroad signalling meant "All right. Go ahead."

The third count, upon which the case was submitted to the jury, alleges, and the plaintiff contends, that the negligence of the motorman consisted (1) in a failure to warn the deceased of the approach of the train; and (2) in running the train at a reckless and excessive rate of speed. The undisputed evidence shows that during the five or six weeks before the accident, while the men had been engaged at this work, from one hundred to one hundred and fifty trains a day passed; that at times they came only two or three minutes apart, so that the men had hardly got back to work when they were obliged to get up again and go to a place of safety; that no one ever had failed before to get out of the way when the whistle was blown. Shambler further testified that on going to work on the morning of the accident Connors told him that he (Connors) had been up all night at a party the night before.

We are unable to perceive any negligence of the motorman. The arrangement which had been adopted for warning the men by blowing the whistle clearly indicated that motormen were not expected to stop or slacken the speed of trains on account of these workmen on the track. It is apparent that neither the motormen nor the workmen expected that the former should look out for the latter. The means adopted to protect the men by the warning whistle appears to have been adequate during the five or six weeks preceding the time of the accident, and was sufficient on that occasion as to all the men except the decedent Connors. The two men working with him, although nearer to the approaching train, went upon the platform when the whistle was sounded. For some unexplained reason Connors did not move. Why he continued to remain in a place of extreme peril is difficult to understand. It would seem that with the noise of the approaching train and the signal given by Shambler, he would have heard it as did his fellow workmen, if he was awake and in possession of his faculties; it may be that he was asleep and did not hear

the warning. If so, it would explain his failure to leave the track and go upon the platform. In view of the evidence, his condition just before the accident is largely a matter of conjecture. *Stewart v. New York, New Haven, & Hartford Railroad*, 206 Mass. 268. The motorman had no reason to suppose that the decedent would remain on the track. If it was his duty to blow the whistle as the train passed Shambler, there is no evidence to show that he did not do so. Shambler testified that at the time he signalled the motorman to blow the whistle Connors still had time to get up and reach a place of safety before he was struck. The evidence shows that the train slowed down, but did not stop in time to avoid striking Connors. As the motorman was not expected to stop or slacken the speed of his train for the men, we are unable to discover any negligence on his part. As he came around the curve he could have seen Shambler and could properly assume that the latter was protecting the men at work upon the track. When it appeared that the decedent did not move and was in danger of being struck, there is no evidence to show that the motorman did not do all in his power to stop his train and avoid the accident.

The plaintiff contends that the motorman was negligent in running his train around the curve at the rate of twenty miles an hour. It does not seem to us that twenty miles an hour is a reckless and excessive rate of speed to run a train on an elevated railway, under ordinary conditions. The elevated structure, including its tracks, is in the exclusive occupation and control of the defendant, and is not like the track of a surface car, where the motorman is bound to regard the equal rights of other travellers upon the highway, who may be travelling on foot, or in carriages, automobiles or other vehicles. Elevated railways are constructed and maintained largely to meet the demand of the public for rapid transit. The fact that this train was running around a curve at the rate of twenty miles an hour does not seem to be reckless or excessive. It is a matter of common knowledge that the tracks upon the elevated structure, in order to pass through the public streets for the accommodation of the great volume of travel in different sections where its lines are constructed, must of necessity contain many curves throughout its entire system.

In considering the question of the duty of the defendant toward the plaintiff's intestate, the language of the present Chief Justice of this court, in *Devine v. New York, New Haven, & Hartford Railroad*, 205 Mass. 416, 419, would seem to be applicable here: "The plaintiff's intestate was working in a highly dangerous place, over which the defendant's servants were obliged to run its trains in the performance of its duties to the public. The evidence all shows that the employees of the city were expected to, and in fact did, except on this single occasion, look out for their own safety. There is nothing to indicate that there was any duty on the part of the defendant's employees to ring the bell at that place, or that, in view of all the noise in the neighborhood, anybody could or did rely upon warning from that source." See also *June v. Boston & Albany Railroad*, 153 Mass. 79.

The evidence fails to disclose any negligence on the part of the defendant's motorman, so that the questions, whether there was any evidence of due care on the part of the plaintiff's intestate, and whether the plaintiff was dependent upon the decedent within the meaning of St. 1909, c. 514, § 129, become immaterial.

The exceptions must be sustained, and judgment should be entered for the defendant in accordance with St. 1909, c. 236.

So ordered.

LYDIA E. MORONG vs. ELLEN A. SPOFFORD.

DANIEL MORONG vs. SAME.

Essex. March 26, 1914.—May 22, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Negligence, Of one controlling real estate. *Landlord and Tenant*, Landlord's duty to tenant's customer.

The owner of a building, who has let the entire second floor to a milliner but retains control of a front stairway leading to a landing on the second floor and of the landing itself, on which are doors leading to the milliner's rooms, and also of a rear stairway which is approached from the landing through a closed door and leads to the rear of the first floor, is not liable for personal injuries received by a customer of the milliner who, going to the landing by the milliner's invita-

tion, by mistake opened the door leading down the back stairs and fell down those stairs, because it cannot be said that the owner invited the customer to use the back stairs or was under any obligation to the customer to keep the door leading to them locked.

CROSBY, J. The female plaintiff, whom we shall refer to as the plaintiff, brings this action to recover damages for injuries received by falling down a flight of stairs in a building owned by the defendant. The action brought by Daniel Morong, the husband of the first named plaintiff, is to recover for consequential damages on account of injuries sustained by her. These cases are before us upon the report of the presiding judge of the Superior Court,* after a verdict for each plaintiff.

The undisputed evidence shows that the plaintiff, on November 11, 1909, at about half past eight o'clock in the evening, ascended a flight of stairs to visit the store of one Gilchrist, a milliner, which was on the second floor of the defendant's building; that there was a hallway or landing on the second floor with two doors leading into the Gilchrist store, and a third door leading from this landing down to the rear of the first floor. There was no lock on this door, which was at the top of the back stairway. The landing is about eight feet square and was lighted. The rear stairway was not lighted and there was no means of lighting it. The tenant Gilchrist occupied the whole of the second floor of the building, and "the plaintiff was familiar with the premises and had visited the store of said Gilchrist on the second floor on a number of occasions, and had been there earlier that day. She had, however, never been on any portion of the premises except the premises of said Gilchrist and the front stairs and landing at the top of said stairs leading to the apartments of said Gilchrist." The defendant retained possession of the back stairway. It appeared that the plaintiff had visited the store in the afternoon of the day of the accident and was told by Mrs. Gilchrist that the latter would see her (the plaintiff) that evening in her (Gilchrist's) kitchen, as the store would not be open. The plaintiff testified that when she reached the landing she tried Mrs. Gilchrist's door and found it was locked; "And then I turned round and there was a door that went opposite to the

* Bell, J.

door where you go down on to the street and I opened it. I said, 'I guess this is the door,' opened it and it swung in over the stairs. . . . I made a step forward. . . . There was n't any landing on the other side, and I went head first down the stairs."

While there was an implied invitation from the defendant as the owner of the premises to the plaintiff to use the front stairway and landing leading to the Gilchrist store, and the defendant owed her the duty of exercising reasonable care to provide safe and suitable approaches thereto, we are of opinion that there is no evidence which would warrant a finding that there was any invitation from the defendant to the plaintiff to open or pass through the door leading down the rear stairway, and that the defendant owed her no duty to keep the door locked. It could not be found that she had a right to assume, as the door was not locked, that it was intended that she might use it as a means of ingress to or egress from the premises. Accordingly we are of opinion that there is no evidence of negligence of the defendant. It follows that, in accordance with the terms of the report, judgment should be entered for the defendant in each case.

So ordered.

C. S. Knowles, for the defendant.

T. S. Herlihy, for the plaintiffs.

OTIS W. RICHARDSON vs. HAVERHILL AND AMESBURY STREET
RAILWAY COMPANY.

Norfolk. March 27, 1914. — May 22, 1914.

Present: RUGG, C. J., LORING, SHELDON, DE COURCY, & CROSBY, JJ.

Negligence, Street railway. Automobile.

If a motorman is operating a street railway car in winter upon a single track at a part of the road where he knows that for some days the snow drifts have compelled the drivers of vehicles to travel on the track without the means of turning off on either side, and yet, with his view obstructed by frost on the glass in front of him, runs the car at the rate of thirty miles an hour and fails to see an approaching automobile, which he could have seen a quarter of a mile away by looking across a field and could have seen nearly five hundred feet away by

looking along an unobstructed track, until it is only one hundred and twenty-five feet ahead of him, and then runs into it with such force as to push it backward about one hundred and twenty feet, these facts are evidence of his negligence in an action against the street railway company for injuries to the automobile caused by the collision.

Where a single track of a street railway is laid in the middle of a highway and, because of an accumulation of snow due in part to the operation of the snow ploughs used by the street railway company to clear the track, the track at a certain place is the only part of the highway in which the drivers of vehicles can travel, if a traveller in an automobile when passing through this place, sees a street railway car approaching a quarter of a mile distant, and being unable to turn out on either side or to back his car successfully to a place of safety, brings it to a stop and tries by means of a bulb horn and an exhaust whistle to warn the motorman of his presence, and in spite of this the car runs into him moving at the rate of thirty miles an hour and damages his automobile, in an action brought by him against the street railway company for this injury to his property these facts are evidence that he was in the exercise of due care at the time of the collision.

TORT to recover damages for injuries to a large limousine automobile of the plaintiff from being run into on January 14, 1910, by a street railway car of the defendant running on a single track on the State highway and main road leading from Amesbury through Merrimac and Haverhill to Boston. Writ dated April 12, 1910.

In the Superior Court the case was tried before *McLaughlin, J.* At the close of the evidence, which is described in the opinion, the defendant asked the judge to rule that on all the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$2,465.19. The defendant alleged exceptions.

The case was submitted on briefs.

J. J. Ryan, R. C. Pingree & J. T. Fitzgerald, for the defendant.

G. L. Mayberry, for the plaintiff.

DE COURCY, J. The plaintiff's automobile was struck by an electric car of the defendant at Amesbury on January 14, 1910. There was abundant evidence to justify a finding that the motorman was negligent, and we do not understand that the defendant argues to the contrary. He knew that for some days the snow drifts had compelled drivers of vehicles to travel on the track at the place of the collision, and that they could not turn off on either side; yet it could be found that he ran his car at a speed of thirty miles an hour, with his view obstructed by frost on the

glass in front of him. He did not see the automobile until it was only one hundred and twenty-five feet ahead of him, although it could have been seen a quarter of a mile away by looking across the field, and there was an unobstructed view along the track for nearly five hundred feet. He testified that, when his car was going at the rate he said this one was moving, he could stop it at one hundred feet; yet it struck the plaintiff's limousine with such force that the latter was pushed backward about one hundred and twenty feet. *Davis v. Boston & Northern Street Railway*, 214 Mass. 98.

On the evidence the issue of the plaintiff's due care also was for the jury. The defendant's tracks were within the limits of the highway, and the plaintiff could use no other portion of the road near the place of the collision because of the accumulation of snow — a condition due in part to the operation of the defendant's snow ploughs. *Nelson v. Old Colony Street Railway*, 208 Mass. 159. *George G. Fox Co. v. Boston & Northern Street Railway*, 217 Mass. 140. It could be found that after the plaintiff saw the approaching car a quarter of a mile distant he acted as a reasonably prudent man would act under the circumstances. The snow bank on his right and the steep slope on his left made it impossible to turn out on either side. Apparently there was not sufficient time before the collision to back his car successfully to a place of safety. He brought his machine to a stop and endeavored, by means of a bulb horn and exhaust whistle, to warn the motorman of his presence, so that by conference they might arrange to pass each other. Even if the plaintiff had sent his chauffeur ahead to stop the electric car when it became apparent that his signals were unheeded, it does not appear that the messenger could have reached a point where his warning would prevent the collision. *George G. Fox Co. v. Boston & Northern Street Railway*, *ubi supra*, and cases cited.

Exceptions overruled.

CLARENCE H. MADDOX vs. MARY H. BALLARD.

Middlesex. March 27, 1914. — May 22, 1914.

Present: RUGG, C. J., HAMMOND, SHELDON, DE COURCY, & CROSBY, JJ.

Negligence, Employer's liability.

In an action by a workman against his employer for personal injuries caused by an explosion of naphtha after it had been poured into a large kettle containing a substance being compounded as a coating for patent leather, it appeared that, after the contents of the kettle had been heated to a temperature of about six hundred degrees Fahrenheit, it was the practice to extinguish the burner that heated it and to draw into the yard the truck in which the kettle was inserted, that before pouring in the naphtha it was of the gravest importance to quench any sparks that might remain in the soot that had gathered on the bottom of the kettle and under the iron platform that held it, that the only means provided for doing this was to throw water underneath the kettle from a pail by using a small tomato can, that an experienced man, in charge of the boiling had warned the defendant's superintendent on two or three occasions that this was an ineffective method of extinguishing the sparks and that a hose should be furnished for the purpose, that the plaintiff's work was to apply the first coating to the leather, which was done inside the factory, and that he had had no experience with the kettle, that he was ordered to go to help the boiler at the kettle and he and another workman were directed to dip pails into a large naphtha can and empty the naphtha into the kettle as fast as they could, and that after the naphtha was poured in a vapor arose from the kettle and sank to the ground and in two or three minutes the explosion occurred which injured the plaintiff. It was not contended that the plaintiff was not in the exercise of due care. *Held*, that there was evidence of negligence on the part of the defendant in failing to provide suitable means for preventing the presence of fire in conjunction with naphtha gas, and in failing to warn the plaintiff of a danger not obvious of which the defendant should have been aware; also that the risk was not one which the plaintiff assumed as a part of his contract of employment.

TORT for personal injuries sustained on August 7, 1911, when the plaintiff was in the employ of the defendant, who carried on business under the name of the Ballard Japanning Company. Writ dated January 20, 1912.

In the Superior Court the case was tried before *Quinn, J.* The declaration and the evidence are described in the opinion. At the close of the evidence the judge refused to order a verdict for the defendant. The defendant then asked the judge to make the following rulings:

"1. On all the evidence, the plaintiff is not entitled to recover against the defendant Ballard.

"2. On all the evidence, the plaintiff is not entitled to recover against the defendant Ballard on the first count of his declaration.

"3. On all the evidence, the plaintiff is not entitled to recover against the defendant Ballard on the second count of his declaration.

"4. On all the evidence, the plaintiff is not entitled to recover against the defendant Ballard on the third count of his declaration."

"14. If the method openly used for extinguishing sparks on the bottom of the kettle at the time or just prior to the accident was the same that was openly used during the entire time of the plaintiff's employment, the defendant Ballard owed the plaintiff no duty to change the method.

"15. The only duty which the defendant Ballard would owe to the plaintiff would be to warn him of any danger in connection with the method openly used not apparent to a workman upon such examination as he would be expected to make when employed if he desired then to know the danger of that method.

"16. If the only danger in connection with that method was that the sparks in the soot would not be extinguished by water so thrown on it, no duty to warn existed, because the danger, if any, would be an obvious or apparent danger.

"17. If the chance that sparks in the soot on the bottom of the kettle might not be extinguished by water thrown upon the kettle is one of the necessary incidental risks of the business, the plaintiff cannot recover against the defendant Ballard.

"18. If the real cause of the explosion was the negligent way that the boiler Foley attempted to guard against the danger of explosion from sparks in the soot on the bottom of the kettle, or did the work in the method openly in use, the plaintiff is not entitled to recover against the defendant Ballard.

"19. If it is apparent to one who looks that throwing water upon the soot on the bottom of the kettle may not extinguish sparks in that soot, the defendant Ballard owed the plaintiff no duty to warn or instruct."

The jury refused to make these rulings, except the fifteenth,

which is held to have been given in substance as an instruction to the jury. The jury returned a verdict for the plaintiff in the sum of \$6,000; and the defendant alleged exceptions, which, owing to the physical disability of *Quinn, J.*, were not signed or returned by him and afterwards with the consent of the parties were allowed by *Jenney, J.*

The case was submitted on briefs.

E. C. Stone, for the defendant.

M. F. Cunningham & M. M. Lynch, for the plaintiff.

DE COURCY, J. The plaintiff's injuries were due to an explosion of naphtha which was being poured into a large kettle of daub in the process of compounding a coating to be used in the manufacture of patent leather.

That he was in the exercise of due care apparently is not controverted. The case was submitted to the jury on three counts, the first alleging a failure to provide safe and suitable appliances, the second a failure to warn and instruct the plaintiff as to dangers that were incident to his work, and the third setting forth a general allegation of negligence. The jury were warranted by the evidence in finding the following facts, most of which were undisputed.

The boiling shed, in which the daub was prepared, was four or five hundred feet distant from the defendant's factory building. The kettle used in the process was about three feet in height and in diameter with a capacity of from one hundred to one hundred and twenty gallons. It was mounted on a truck, the platform of which had a circular opening in which the kettle was inserted, so that the bottom of the kettle extended about six inches below the platform. Underneath was a burner, to which kerosene oil was supplied by means of an air pump. The process of cooking required a heating of the daub to a temperature of about six hundred degrees Fahrenheit; and after this was completed the burner always was extinguished, and the truck with the kettle was drawn into the yard, where the naphtha was added to the mixture.

It was of the gravest importance that no fire should exist in the vicinity of the kettle while the naphtha was being poured into it. The soot which gathered on the bottom of the kettle and under the iron platform during the process of heating in the boiling shed

was likely to retain sparks. The only means provided by the defendant for extinguishing any such sparks was a pail of water and a small tomato can with which to throw the water underneath the kettle. The defendant's experienced boiler, one Foley, had notified her superintendent on two or three occasions that this method was not an effective way to extinguish the sparks, and that a hose should be furnished for this purpose. On the afternoon of the accident, after Foley had cooked the mixture and had drawn the truck and kettle into the yard, he threw on water by the usual method.

The plaintiff's work was that of applying the first coating of daub to the leather, and it was performed within the factory. At about five o'clock he had finished his day's work and was changing his clothes to go home, when the superintendent ordered him to go out and help Foley. The kettle was then about twenty feet from the boiler house. Foley was engaged in stirring the mixture, and the only other persons present were the superintendent, the plaintiff and a fellow workman, one Brennan. The plaintiff never before had done any work about the kettle, nor had he had occasion to observe the process of preparing the daub; and no instruction or warning was given to him at this time. Foley directed the plaintiff and Brennan to dip pails into a large naphtha can that was near by, and to empty the naphtha into the kettle as fast as they could. As the naphtha was poured in, a sort of mist or vapor arose out of the kettle, spread and sank to the ground, and in two or three minutes occurred the explosion which injured the plaintiff. The jury, under the instructions of the presiding judge, must have found that the explosion was occasioned by an unextinguished spark that was concealed in the soot under the kettle.

The place where the plaintiff was set at work was one of peculiar danger. And the jury could find that the peril was due to a negligent failure on the part of the defendant to provide suitable means for preventing the presence of fire in the vicinity of a kettle where there was inflammable naphtha gas, and especially so after her superintendent had been notified of the inadequacy of the method adopted to extinguish the sparks. *Brooks v. Kinsley Iron & Machine Co.* 202 Mass. 228. Again, the danger was not an obvious one and was unknown to the plaintiff, who was entirely unfamiliar

with the work and its attendant risks. But it could be found that the defendant's representatives did know or should have known that unextinguished sparks might be present under the kettle. In fact there was evidence that the mere throwing of water upon finely charred powder-like charcoal soot, which was at a temperature of five hundred and sixty-five degrees, would be likely to cause spontaneous combustion. Consequently the jury could find that the defendant was negligent in failing to warn the plaintiff of the danger of which she should have been aware. *Dulligan v. Barber Asphalt Paving Co.* 201 Mass. 227. This disposes of the first four requests for rulings. The presence of a spark underneath the kettle was not apparent in fact; and it does not appear that the plaintiff was present when the inadequate or careless process was used; accordingly the sixteenth and nineteenth requests were rightly refused. The fifteenth was sufficiently covered in the charge. The duty of providing a safe place for her workmen, and that of warning them as to dangers that were not obvious, were personal to the employer, and she could not escape liability by delegating them to a fellow servant; hence the defendant was not entitled to the eighteenth request.

The remaining rulings requested relate to the defense of assumption of risk. As to that, it is enough to say that the danger which resulted in the injury to the plaintiff was not within the scope of the work for which he was employed, and indeed was not even in existence at the time when he entered the defendant's employ. Accordingly the risk of this danger was not assumed as matter of law as a contractual one. Whether it was appreciated and assumed as matter of fact was for the jury, and the instructions on this point were accurate and adequate. And on that issue the jury well might consider that the plaintiff had a right to suppose, in the absence of anything to the contrary, that his employer had made whatever inspection was reasonably necessary for the purpose of seeing that no fire was present where it would explode the mixture of vaporized naphtha and air. *Delaney v. Framingham Gas, Fuel & Power Co.* 202 Mass. 359.

The presiding judge was warranted in permitting the experienced employees Foley and Brennan and the chemist Miles to testify as experts, and the questions as to the safety of the method used by the defendant to extinguish the sparks were competent.

The fact that the employer had long employed an unsafe method for preventing a hidden danger gave her no vested right to continue it, especially as against this plaintiff, who was ignorant of the process to which the appliance had been subjected before he was ordered to pour naphtha into the kettle immediately before the explosion. *Erickson v. American Steel & Wire Co.* 193 Mass. 119. *Snow v. Housatonic Railroad*, 8 Allen, 441, 447.

The defendant claimed an exception "to such portions of the charge as were inconsistent with the foregoing requests for rulings." As the judge allowed the exception in that indefinite form, without asking to have the alleged inconsistencies specified, we consider it, but it is sufficient to repeat that the rulings requested were refused properly, with the exception of the fifteenth, which was given in substance.

Exceptions overruled.

THOMAS B. GANNETT, administrator, *vs.* CITY OF CAMBRIDGE.

SAME *vs.* SAME.

SAME *vs.* SAME.

Middlesex. March 27, 1914. — May 22, 1914.

Present: RUGG, C. J., HAMMOND, SHELDON, DE COURCY, & CROSBY, JJ.

Tax, Assessment. Statute, Construction, Repeal.

Where property of a person has been assessed for taxation as of April 1 of a certain year, the power of the assessors to increase the assessment for that year on account of property that has been omitted from the annual assessment, given by St. 1909, c. 490, Part I, § 85, as amended by St. 1911, c. 89, is confined to the period of eleven days there prescribed and cannot be exercised after December 20 of the year in question; and an attempt by the assessors to increase such an assessment in May of the following year, upon a recommendation by the tax commissioner under St. 1910, c. 260, of a revision of the valuation of the property, is void.

St. 1910, c. 260, giving the tax commissioner power to recommend to boards of assessors a revision of the valuation of property, did not repeal or amend St. 1909, c. 490, Part I, § 85, which required that an additional assessment by assessors upon property omitted from the regular assessment should be made between the fifteenth and twentieth days of December next ensuing; and by St. 1911, c. 89, such an additional assessment must be made "between the tenth and twentieth days, both inclusive, of December next ensuing."

CONTRACT by the administrator of the estate of Thomas Gannett, late of Cambridge, who died on December 9, 1912, to recover the sum of \$22,791.27 with interest from August 4, 1913, as the amount of a tax assessed for the year 1912 and paid to the city of Cambridge under protest. Writ dated August 7, 1913; and a

PETITION under St. 1909, c. 490, Part I, § 77, filed on August 4, 1913, by the same administrator, appealing from the refusal of the assessors of the city of Cambridge to abate the tax above mentioned; also a

PETITION filed on the same day under St. 1910, c. 260, appealing from the revision of the valuation of the property of the petitioner's intestate by the tax commissioner which was the basis of the assessment of the tax.

In the Superior Court the three cases were heard together by *Wait, J.*, upon an agreed statement of facts, which included the facts stated in the opinion. The judge found the facts to be as stated. In the action of contract he found for the plaintiff in the sum of \$23,566.17, and at the request of the parties reported the case for determination by this court with the stipulation that, if this finding was correct, judgment should be entered for the plaintiff, and that, if it was wrong, such entry or order should be made as justice required. He denied the petition for an abatement and ordered that the appeal under St. 1910, c. 260, be dismissed, and at the request of the parties also reported those cases for determination by this court.

The cases were submitted on briefs.

A. Hemenway, for the administrator.

J. F. Aylward, for the defendant and respondent.

H. R. Bailey & E. B. Church, as counsel in another case involving the same questions, were permitted also to file a brief.

DE COURCY, J. In the regular assessment of taxes for the year 1912, the board of assessors of Cambridge assessed to Thomas B. Gannett, a resident who had filed no list of his estate, a tax on personal estate valued at \$50,000. On October 9, 1912, he paid his total tax, including that on real estate owned by him. His death occurred on December 9, 1912; and the plaintiff was appointed administrator of his estate in the following January. On May 19, 1913, the tax commissioner of the Commonwealth, assuming to act under the authority conferred on him by St.

1910, c. 260, wrote to the board of assessors that in his opinion the personal property of Gannett was not properly valued for the purposes of taxation for the year 1912, and recommended that they revise the tax assessed to him from one based on a valuation of \$50,000 to a tax at a valuation of \$1,153,800. Thereupon the assessors voted that the 1912 tax assessed to Gannett be revised as so recommended; they entered the sum of \$1,103,800 in the book used for listing the additional December assessments (made in accordance with St. 1909, c. 490, Part I, § 85), and wrote across the left hand page "Supplemental Warrant May 20, 1913." They then sent to the collector of taxes a communication notifying him of their action and directing him to collect from Thomas B. Gannett the revised tax. The administrator paid the tax under protest, and brought the action and the two petitions, representing different forms of remedy. The judge of the Superior Court heard the cases upon an agreed statement of facts and reported them to this court after a finding for the plaintiff in the action of contract.

The cases involve the construction of St. 1910, c. 260, § 1, which reads as follows: "If in the opinion of the tax commissioner any property in the Commonwealth is not properly valued for the purposes of taxation, he shall have authority to recommend to local boards of assessors a revision of the same. If such recommendation is accepted and adopted by the local boards the new assessment shall thereupon be operative. Any person aggrieved by such revision may appeal to the Superior Court for the county in which the property is situated." This is in the precise language of St. 1908, c. 550, § 5, which was omitted when the laws concerning taxation were codified in 1909 (St. 1909, c. 490), and was re-enacted on the recommendation of the tax commissioner. In view of the radically different interpretations placed on the broad language of the present act by the parties to this controversy, a review of its history may manifest more clearly the purpose of the Legislature in enacting it.

The commission on taxation, appointed under the provisions of c. 129 of the Resolves of 1907, to investigate the subject of taxation and to codify, revise and amend the laws relating thereto, transmitted their report to the Legislature in January, 1908. Among other subjects, the report discussed that of "supervision

of the assessment of property for taxation." After dwelling upon the need of greater uniformity in the administration and enforcement of the law throughout the Commonwealth, they recommended a measure designed to extend the supervision already exercised by the State over the assessment of property. The fourth section of their proposed bill was as follows: "The supervisors of assessors shall, under the direction of the tax commissioner, on or before the first day of May in each year, furnish to each board of assessors of the cities and towns of the Commonwealth all the information relating to the assessment, valuation and ownership of property of any inhabitant of said city or town that has come into the possession of the tax commissioner's department, particularly under the provisions of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven. They shall have authority, under the direction of the tax commissioner, to revise the valuation of all property for the purposes of taxation; and any person aggrieved by such revision may appeal to the Superior Court for the county in which the property is situated. They shall render to said boards of assessors such further instruction and supervision as to their respective duties as may be necessary to secure uniform assessment and just taxation and to equalize the valuation of property for purposes of state, county and local taxation." This, with the exception of the portion in parentheses, was enacted as § 4 of St. 1908, c. 550, under the title "An Act to provide for the more effective administration of the laws relating to taxation;" and § 5, as already stated, was in the precise language adopted later in the 1910 act. When the taxation laws were codified in 1909 this fifth section was omitted. Its re-enactment in the statute under consideration was due to the recommendation of the tax commissioner, who in his report for the year 1909 (page 23) said: "This provision was omitted from the codification, on the ground that there were other provisions of the statutes which practically covered it; namely, the power of the commissioner to direct assessors to adopt adequate methods of keeping their records, or to make fuller examination of the records of the registry of deeds and probate court, or to make use of information that the tax commissioner has furnished to them. But it is clear, on reading the two sections side by side, that the power

to recommend action on the part of assessors for the purpose of obtaining or using information did not include the power of recommending revisions of valuations, and that something was lost by the omission."

When examined in the light of this history it seems plain that it was not the purpose of the commission to recommend or of the Legislature to create a new power to assess taxes. Furthermore if the radical change in our system of assessing taxes contended for by the city had been intended, the Legislature presumably would have added provisions in detail for the assessment, entry and collection of the new tax, the limit of time within which it might be assessed, and the liens to be created by it, and would have made changes in existing statutes, such as those needed for the protection of persons interested in the settlement of estates, and in the purchase and sale of real estate subject to possible liens created by the act. The purpose of the statute, as indicated by its history and reasonably clear from its language, was to give the tax commissioner power to recommend changes in valuation, and thereby assist the local assessors in performing their duties, in order that inequalities arising from the omission or undervaluation of property might be corrected by the assessors in the exercise of powers which they already possessed.

The power to add to the tax list after it has been committed to the collector has been given to the assessors since 1868. See Sts. 1868, c. 320; 1873, c. 272; Pub. Sts. c. 11, § 78; Sts. 1886, c. 85; 1888, c. 362; R. L. c. 12, § 85. Previous to these enactments, they had no authority to make any further assessment after the warrant had left their hands. *Opinion of the Justices*, 18 Pick. 575. And see *Lowell v. County Commissioners*, 3 Allen, 546, 548, 549; *Charland v. Home for Aged Women*, 204 Mass. 563, 569. And although the early statutes permitted them to add only property which they should "discover" to have been omitted from the last annual assessment, the right of the tax commissioner to give them information has existed since at least 1898. See St. 1898, c. 507, § 3. When the statute of 1910 was passed, the time for the addition of property omitted from the regular assessment was the period between December 15 and 20. St. 1909, c. 490, Part I, § 85. The statute under consideration does not purport to repeal or amend that provision. On the contrary

the Legislature in 1911 expressly indicated its adherence to the policy of assessing taxes as we go along, by limiting the time of making omitted assessments "between the tenth and twentieth days, both inclusive, of December next ensuing." St. 1911, c. 89.

This is decisive of the cases at bar. The tax in controversy was not a new and separate tax, but was omitted from and in legal effect was a part of the annual assessment, made as of April 1, 1912. We find no authority in the St. of 1910, or elsewhere in our tax laws, for the action of the board of assessors in assessing the tax in question on May 20, 1913, which was five months after the last day when assessments for omitted property could be made for the year 1912. In the meantime a new municipal year had begun, with its new appropriations, and its time as of which must be assessed the taxes of another year; and the time had expired for performing the duties pertaining to the taxation of property for the year 1912. See, for instance, St. 1909, c. 490, Part I, §§ 59, 60, 100, 101. We are of opinion that the assessors acted without legal authority in assessing the tax in question subsequent to December 20, 1912, and that consequently the assessment is void. The action of the judge of the Superior Court was correct. *Harrington v. Glidden*, 179 Mass. 486, and cases cited. *Wheatland v. Boston*, 202 Mass. 258. The petition for abatement is to be denied, and the appeal under St. 1910, c. 260, dismissed. In the action of contract judgment is to be entered on the finding for the plaintiff.

So ordered.

JOHN F. MCKAY *vs.* PENELOPE F. COOLIDGE, individually and
as executrix.

Suffolk. December 12, 1913. — May 23, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Clerks of Courts. Limitations, Statute of.

If a clerk of court neglects to enter a judgment for the plaintiff in an action, in consequence of which the action subsequently is dismissed for want of prosecution, this gives the plaintiff an immediate right of action against the clerk, on

which the statute of limitations begins to run from the time when the judgment should have been entered, although the plaintiff's consequent financial loss is not ascertained, or even does not occur, until long afterwards.

RUGG, C. J. This is a suit in equity brought in January, 1913, to collect from legatees under the will of Joseph A. Willard damages sustained through the alleged negligence of Mr. Willard, as clerk of the Superior Court for the County of Suffolk. The material averments of the bill are that Mr. Willard as clerk negligently failed to keep accurate records respecting the case of *Wetmore v. Karrick* and to notify the presiding judge of the standing of the case, whereby it was dismissed in June, 1899, upon a general calling of the docket, as a case in which no action had been taken within the preceding year while in truth action had been so taken, and the case was theretofore, in August, 1898, ripe for final judgment in favor of the plaintiff *Wetmore*, which judgment was not entered as required by law through the negligence of Mr. Willard as clerk; and as a result the present plaintiff, who in this regard is the assignee of the rights of *Wetmore*, lost a valuable judgment against *Karrick*. Mr. Willard died in 1904; his will was allowed, his estate was administered and a final account by his executors of their settlement of his estate was allowed by the Probate Court, in 1906.

A demurrer was sustained in the Superior Court * and the plaintiff's appeal from a decree dismissing the bill brings the case here.

The cause of action set forth in the plaintiff's bill is a tort. The misconduct of a clerk of a court in failing to perform his duties in the respects averred constitutes misfeasance or nonfeasance in office. *United States v. Daniel*, 6 How. 11. *Dunlop & Co. v. Keith*, 1 Leigh, 430. The alleged negligent conduct occurred in 1898 and 1899. That conduct as alleged was definite in its effect on the plaintiff in that it was a failure to enter a judgment in his favor when it ought to have been entered, and an omission to make a correct court record, and an oversight in not advising the presiding judge of the facts touching a particular case. These wrongful acts were patent at the time they were done. They were not committed in secret, nor were they concealed. They then constituted an infraction of the plaintiff's rights. He was entitled at that time to have his judgment properly entered and not to

* By *Morton, J.*

have his action dismissed for want of prosecution, which was in substance an adjudication against his claim. If he seasonably had availed himself of the ample remedies provided by law in his behalf, his rights might have been restored. *Karrick v. Wetmore*, 210 Mass. 578. But his failure to avail himself of these remedies did not postpone the accrual of his right of action against the clerk. The misconduct of the clerk remained the initial wrong. That violation of his rights was personal to the plaintiff. It was of such nature that the law implied a damage, even though in fact only nominal, for which an action might have been brought at once. The duty which the clerk is alleged to have violated was one directly and instantly affecting the rights of the plaintiff. That his ultimate financial loss was not immediately ascertained or did not occur until later is an immaterial circumstance.

It long has been the law that the nonfeasance or misfeasance of a public officer constitutes the cause of action and not the resulting damage. *Ravenscroft v. Eyles*, 2 Wils. 294. *Goding v. Ferris*, 2 H. Bl. 14.

In principle *Caesar v. Bradford*, 13 Mass. 169, and *Miller v. Adams*, 16 Mass. 456, are controlling. These were actions against officers, the first for falsely returning that he had taken bail, and the second for misfeasance in serving the writ so that judgment rendered in the case was liable to be reversed. In each case it was held that the right of action arose at the time of the wrongful act and not at the time when the damage became manifest.

These cases are distinguishable from *Rice v. Hosmer*, 12 Mass. 127, *Mather v. Green*, 17 Mass. 60, *West v. Rice*, 9 Met. 564, and similar instances of actions against a sheriff for taking a valid but insufficient bail bond where it has been held that the right of action accrues, not when the writ is filed in court, but when a return of *non est inventus* has been made upon the execution issued against the principal. These decisions are placed upon the ground that the return of the officer that he had made an arrest and taken a bail bond was strictly true, and that as it was the custom for the sheriff to retain the bail bond until it was called for by the plaintiff after his execution was unsatisfied, knowledge of the wrong done him could not come home to the injured party until it became time for him to call for the bond.

The great weight of authority in other jurisdictions supports

the conclusion that the breach of duty of a public officer which directly affects the rights of a private individual gives rise at once to a right of action even though the entire extent of the injury may not be discovered until later. *Snedicor v. Davis*, 17 Ala. 472. *Shackelford v. Staton*, 117 N. C. 73. *Betts v. Norris*, 21 Maine, 314. *Hall v. Tomlinson*, 5 Vt. 228. *Lambert v. McKenzie*, 135 Cal. 100. *Rosborough v. Albright*, 4 Rich. (S. C.) 39. *Owen v. Western Saving Fund*, 97 Penn. St. 47. *Daniel v. Grizzard*, 117 N. C. 105. *Kerns v. Schoonmaker*, 4 Ohio, 331. *Utica Bank v. Childs*, 6 Cowen, 238. *Bartlett v. Bullene & Co.* 23 Kans. 606. *Jones v. Bain*, 12 U. C. Q. B. 550. *Lightner Mining Co. v. Lane*, 161 Cal. 689, at page 696.

The nature of the wrong here alleged is such that injury to the plaintiff flowed from it as a necessary consequence. The circumstances that he failed to avail himself of the remedies for correcting that wrong within the time allowed and then followed an improper course and thereby long delayed the discovery of the full extent of his actual loss, do not affect the principle upon which the running of the statute of limitations rests. Hence it is not necessary to discuss the distinction sometimes suggested to the effect that a public officer is not liable to an individual for breach of a public and official duty until there has been suffered a special and peculiar injury not common to the general public, a proposition which finds support in *Bank of Hartford County v. Waterman*, 26 Conn. 324; *People v. Cramer*, 15 Col. 155; *State v. McClellan*, 113 Tenn. 616; nor to determine whether these decisions are in harmony with sound reason or the weight of authority.

The result is that the plaintiff's claims, having arisen in 1898 and 1899, are barred by the statute of limitations.

Decree affirmed with costs.

H. T. Richardson, for the plaintiff.

R. B. Coolidge, for the defendant.

CLARENCE S. VOORHEIS & others, trustees, vs. NATIONAL
SHAWMUT BANK.

Suffolk. March 9, 1914. — May 23, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Bankruptcy, Unlawful preference.

In an action of tort by the trustee in bankruptcy of a firm of building contractors against a bank to recover an alleged unlawful preference under the bankruptcy act of 1898, § 60 a, as amended in 1903 and 1910, it appeared that the defendant had lent sums of money to the firm, that a note of the firm for \$5,000 which was held by the defendant was coming due and that the firm wished to renew it for four months, that the defendant was not willing to do this and took the firm's demand note for the amount due with the understanding that it should be paid in two, three or four days, and that it was paid in nine days. Fifteen days after this payment the firm filed a voluntary petition in bankruptcy. When the payment was made the defendant had been informed that the firm was doing a good business and had pending contracts that would yield a large profit. The only matter that had come to the knowledge of the defendant that might warrant even a suspicion as to the financial standing of the firm was that one of the defendant's officers noticed in a newspaper that the firm had "some labor troubles" in connection with a contract that they had for work upon a hotel. The firm had deposited in its account with the defendant \$7,000 in the two weeks previous to the payment, \$25,000 in the month before, and \$16,000 and \$27,000 respectively in the two months before that. The defendant's other loans to the firm had been made for short terms and had been paid promptly. *Held*, that there was no evidence of an unlawful preference and that a verdict should be ordered for the defendant.

TORT by the trustees in bankruptcy of the L. W. Taylor Company, a partnership, consisting of Leonard W. Taylor and John H. Barnes engaged in the business of building contractors, to recover the amount of an alleged unlawful preference under the bankruptcy act of 1898, § 60 a, as amended in 1903 and 1910. Writ dated September 5, 1912.

In the Superior Court the case was tried before *Lawton, J.*, who at the close of the plaintiffs' evidence, which is described in the opinion, ruled that the plaintiffs were not entitled to recover and ordered a verdict for the defendant. The plaintiffs alleged exceptions.

J. B. Jacobs, for the plaintiffs.

L. A. Ford, (*F. W. Bacon* with him,) for the defendant.

SHELDON. J. This case is here upon the plaintiffs' exceptions to the ruling made at the trial that upon the declaration and evidence the plaintiffs were not entitled to recover. In our opinion the ruling was right. We cannot find in the record evidence to warrant a finding that the defendant had reasonable cause to believe that the L. W. Taylor Company (hereinafter called the company) was insolvent when the payment was made to it by that company, or that it had such cause to believe that the payment would effect a preference to it over other creditors of the company.

The defendant, on the recommendation of one Fuller, had lent to the company (among other sums) the sum of \$5,000. The company's note for this came due on June 5, 1912, and the company desired it renewed for another term of four months. The defendant was not willing to do this, and took the company's demand note for the amount, with the understanding that it was to be paid in two or three or four days. It was paid on June 14, partly by the company's own check and partly by a draft drawn by the company on a third party. The defendant had been informed that the company was doing a good business, and had pending contracts which should yield a large profit. Nothing seems to have come to the knowledge of the defendant to warrant even a suspicion as to the financial standing of the company, except that one of its officers had casually noticed in a newspaper that the company had "some labor troubles" in connection with a contract that it had for work upon a hotel; but apparently no one regarded this as a circumstance of any importance. The company kept an account with the defendant, and deposited with it in 1912, \$27,000 in March, \$16,000 in April, \$25,000 in May, and more than \$7,000 in the first fourteen days of June. On June 29, 1912, the company filed a voluntary petition in bankruptcy.

The defendant's conduct did not indicate a distrust of the company's solvency. Its other loans to the company had been made for short terms and had been paid promptly. It did not suddenly withdraw from the company what had been understood to be a permanent line of credit. It merely adhered to the understanding upon which its loan had been made. The company's lack of ready funds to take up the note coming due on

June 5 was not, under the circumstances here disclosed, evidence of insolvency such as to give the defendant the reasonable cause of belief required by the national bankruptcy act, § 60 a, b.

The verdict for the defendant rightly was ordered.

Exceptions overruled.

ANDREW E. COLE vs. L. D. WILLCUTT AND SONS COMPANY.

Suffolk. March 9, 1914. — May 23, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Negligence, Invited person.

An invitation, by a general contractor in charge of alterations in a building to an employee of a subcontractor, to use in the course of his employment stairs which workmen of the contractor have nearly completed and upon which they are laying balusters or rounds, is an invitation to use the stairs in the condition in which they are as to light and incompleteness, and such employee of a subcontractor has no right of recovery from the general contractor for personal injuries caused by his stepping on a round lying upon the stairs and slipping and falling, because the general contractor owed him no duty to give him any warning of such a risk, which was obvious upon proper inspection.

TORT for personal injuries received when the plaintiff, an employee of an independent contractor who was doing the plumbing work in the making of certain alterations in the Rich Building in Boston, for which the defendant was the general contractor, fell down a flight of stairs which was in the defendant's exclusive control.

The case previously was before this court and was reported in 214 Mass. 453, when exceptions taken by the defendant at a trial before Dana, J., which resulted in a verdict for the plaintiff, were sustained.

There was a new trial before Lawton, J. The material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

B. A. Brickley, for the plaintiff.

W. R. Bigelow, (A. L. Nickerson with him,) for the defendant.

SHELDON, J. The defendant had a contract to make certain alterations in a building, including the construction of a flight of stairs from the first floor of the building to the basement. The plaintiff was in the employ of an independent contractor who was doing the plumbing in the same building. The stairs were nearly finished, and a servant of the defendant was laying balusters or rounds upon them, when the plaintiff, in going down the stairs in the proper performance of his work, stepped upon one of these rounds, slipped, fell and was injured. The defendant had exclusive control of the stairs. The plaintiff testified that the defendant's superintendent had instructed him to use the stairs in going to the basement, and there was evidence of the superintendent's authority to do this. There was other evidence, much of which is set out at needless length, by question and answer, in a manner which ought not to have been permitted by the justice who allowed the exceptions. At the conclusion of the plaintiff's evidence, a verdict was ordered for the defendant and the case is here upon the plaintiff's exceptions.

If the plaintiff was using the stairs by the bare sufferance or passive acquiescence of the defendant, we regard the case as settled by the former decision (214 Mass. 453). As to this point, we find no material difference in the evidence now presented from that which formerly was before the court. While there was evidence that the stairs had been nearly completed before the happening of the accident, yet the placing of the rounds remained to be done, and the defendant owed to the plaintiff as a mere licensee no duty to maintain the stairs in a safe and suitable condition. It was bound only to refrain from doing him wilful injury and from wantonly or recklessly exposing him to danger. There was no evidence of that.

But the plaintiff contends that the defendant had invited him to use the stairs, and so owed him a duty to keep them in safe condition for his use. If there was such an invitation, it was merely to use them in the condition in which they were, with whatever work was openly and plainly being done upon them. When the plaintiff started down the stairs, he was bound to know that work might be going on upon them, that the defendant's men might be placing these rounds. If the stairs were but dimly lighted, that very fact required him to use some diligence to as-

certain the existing state of things. The case, assuming such an invitation to have been given, comes under the rule stated in *Sullivan v. New Bedford Gas & Edison Light Co.* 190 Mass. 288, 292. The risk of accident was obvious upon proper inspection, and there was no duty upon the defendant to give any warning to the plaintiff. *Kempton v. Boston Elevated Railway*, 217 Mass. 124. And see *Crimmins v. Booth*, 202 Mass. 17, 22; *Gainey v. Peabody*, 213 Mass. 229; and *Galli v. Drapeau*, 216 Mass. 144, 146.

The verdict for the defendant was ordered rightly.

Exceptions overruled.

MALDEN HOSPITAL vs. WILLIAM H. MURDOCK.

Suffolk. March 10, 1914. — May 23, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Husband and Wife, Separate support. Contract, Implied.

No action can be maintained by a third person against a husband for the value of necessities furnished to his wife who is living apart from him by mutual consent, if, before the necessities were furnished, the Probate Court, on a petition by the wife under R. L. c. 153, § 33, had ordered the husband to pay a certain sum to the wife periodically for her support and that order remained in force and was complied with by the husband.

CONTRACT upon an account annexed for \$116.20 for board and care and the amount paid to a special nurse for the defendant's wife. Writ in the Municipal Court of the City of Boston dated February 1, 1913.

In the Municipal Court the case was heard by *Bolster*, C. J. He filed a memorandum containing findings and rulings in substance as follows:

Since October 7, 1896, the defendant's wife had lived apart from him by mutual consent, neither party desiring or being willing to resume marital relations. In November, 1896, she filed in the Probate Court a petition for separate support. At the time of the trial of this action, no adjudication had been had on that petition, which was still pending. Interlocutory orders had been made and complied with for increasing weekly payments, \$10 weekly since 1902.

In 1899 certain back bills were paid by the defendant and a stipulation was made, which provided in substance that, in view of a decree of the Probate Court, then in force, that the defendant should pay his wife \$7 a week for her separate support and that he should pay \$173 for some extraordinary bills contracted by her, it was "agreed that no demand shall be hereafter made upon said William for the payment, nor shall he be required or expected to pay weekly more than the \$7 per week as decreed, under any circumstances, unless said decree shall be modified by the court, or for any indebtedness of or bills contracted by said Mary, unless the occasion for incurring such indebtedness and the reasons therefor are, before the same are incurred or contracted, fully stated and explained to said William, and an opportunity given him to express his views thereupon, and reasons, if any, against the same."

In 1911, being ill and advised to undergo an operation, the wife sent notice of the situation to the defendant, who refused to become responsible.

The expenditures set out in the account annexed were necessary to the defendant's wife's prolonged health, and the amount was proportionate to his means and situation in life. The weekly allowance ordered by the Probate Court was adequate for her ordinary living expenses, but was inadequate for such unusual and extraordinary expense as the surgical operation.

On June 15, 1912, the wife filed a petition in the Probate Court, asking that the defendant be required to pay bills incurred in connection with the operation, amounting to \$551.42, which included the items in the declaration in this case.

The defendant asked for the following ruling: "33. The pendency of the petition for the allowance of this claim in favor of the plaintiff by the Probate Court, is a good defense to the present action."

The ruling was refused. There was a finding for the defendant, and the case was reported to the Appellate Division, who dismissed the report. The plaintiff appealed.

The case was submitted on briefs.

M. Coggan, for the plaintiff.

J. H. Butler & C. H. Waterman, for the defendant.

SHELDON, J. The plaintiff relies upon the well settled doctrine

that where a wife is living apart from her husband with his consent and without provision having been made for her support, she carries with her his credit, and he is liable for necessities furnished to her by third persons. *Sturbridge v. Franklin*, 160 Mass. 149. *Mayhew v. Thayer*, 8 Gray, 172, 175. But besides the right of pledging his credit for her support she may by petition filed in the Probate Court obtain against him an order or decree, under which he will be obliged to pay to her for her support such sums at such intervals as that court may find to be reasonably necessary for that purpose. R. L. c. 153, § 33. *McIlroy v. McIlroy*, 208 Mass. 458. And she may enforce such payment, if necessary, by appropriate legal process. R. L. c. 153, § 35; c. 152, § 29. Manifestly, when she has availed herself of this remedy and has obtained a decree obliging him to pay to her such sums as it has been adjudged are the amounts for which he should be held, it no longer is true that provision has not been made for her support, and the ground for action by third persons against her husband no longer exists. This view is confirmed by the fact that the statute provides that an order for the support of the wife may be made upon the application of the husband as well as upon that of the wife; and the purpose of an application by the husband ordinarily would be to relieve himself from a multiplicity of suits by third persons for necessities furnished to his wife and to have the total amount of his liability determined in one proceeding. Accordingly it was held under an earlier act (St. 1874, c. 205), now incorporated into R. L. c. 153, § 33, that a father was not liable for the support of his minor child after its custody had been given to its mother by a decree of the court, which had jurisdiction to determine both the question of its custody and what provision, if any, should be made for its support. *Brow v. Brightman*, 136 Mass. 187.

In this case it appeared that upon the wife's petition orders had been made by the Probate Court for the payment by the defendant of a fixed weekly sum to his wife for her support. The latest one of these orders still is in force and has been complied with by him. It follows that, although she is living apart from him by his consent, provision has been made for her support, and this action cannot be maintained. *Alley v. Winn*, 134 Mass. 77. *Bailey v. Dillon*, 186 Mass. 244. Our decision does not rest upon the stipulation filed in the Probate Court. The court took no action

upon that stipulation, and it stands merely as an agreement between husband and wife. *Silverman v. Silverman*, 140 Mass. 560. Nor have we considered the refusal of the Chief Justice of the Municipal Court to rule that "the pendency of the petition for the allowance of this claim of the plaintiff by the Probate Court, is a good defense to the present action." That request did not refer to the proceedings in the Probate Court which we have discussed, but to a later petition by the wife that the defendant be ordered to pay to her a sum of money which included the amount now sued for. The Probate Court has taken no action upon that petition, and its effect need not be determined.

The order dismissing the report must be

Affirmed.

JOSEPHINE ROMANA vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 10, 11, 1914. — May 23, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Practice, Civil, Exceptions, Conduct of trial: requests and rulings. Negligence, Invited person, Licensee, In use of electricity, Wanton, reckless or wilful misconduct.

It here was *intimated* that, if the practice of presenting to this court unnecessarily and unreasonably voluminous bills of exceptions, calling "for undue effort on the part of the court to pick out the few important facts from the undigested mass of irrelevant and impertinent facts with which they are covered up," is persisted in, it may call for drastic action to be taken by this court of its own motion.

The mere facts that a street railway company placed a fence around a car barn maintained by it in such a position with reference to a well worn path, which was outside of the fence but on its premises, that persons were likely to be and were attracted to the use of the path, and that it permitted such use, in the absence of evidence that the path was laid out or wrought by it, does not constitute even an implied invitation by it to such persons to use the premises; and in an action against the company by a child who while using the path was injured by a shock from a current of electricity in a pole of the defendant near the path, the plaintiff does not have the rights of a person invited to use the path, but only those of a licensee, and in order to recover must show that his injuries were caused by wilful, wanton or reckless misconduct on the part of the defendant or of its servants or agents.

In an action by a girl ten years of age against a street railway company for personal injuries sustained, while the plaintiff was using a path upon premises of the defendant near a car barn, by her coming in contact with a pole next to the path charged with electricity from the defendant's wires, there was evidence which

tended to show that the path was used generally by children and others in the neighborhood with the acquiescence of the defendant, that, about five hours before the plaintiff was injured, a boy had received a shock from the same pole, that he and his companions had warned an employee of the defendant in charge of the premises as to the condition of the pole and that nothing was done by the defendant either by way of withdrawing the license to use the path, of checking the escape of electricity into the pole or of giving any warning to persons using the path. *Held*, that findings were warranted that the conduct of the defendant through its employee was intentional and had a natural tendency to injure others, including the plaintiff, that such conduct was known or should have been known by the defendant, and that it was accompanied by a wanton and reckless disregard of its probable consequences.

Where, at the trial of an action for personal injuries sustained while the plaintiff was using a path on premises of the defendant, there is no evidence which will warrant a finding that the plaintiff was invited to use the path, but there is evidence tending to show that he was using it as a licensee of the defendant, and also evidence tending to show that he was a trespasser thereon and that the defendant was guilty of wanton, reckless and wilful misconduct toward him, which caused his injury, if the judge, subject to exceptions by the defendant, leaves to the jury the question, whether the plaintiff was invited by the defendant to use the path, with appropriate instructions as to the defendant's duty in case he was found to have been so invited, and also charges them that, if he was not invited, he was a trespasser thereon and that the defendant owed him no duty excepting to refrain from wanton, reckless and wilful misconduct, and the jury finds for the plaintiff, the defendant's exceptions must be sustained, because the jury might have found that the plaintiff was invited to use the path and was injured by negligence of the defendant which was not wanton, reckless or wilful misconduct.

At the trial of an action against a corporation for personal injuries suffered by a trespasser or mere licensee upon premises of the defendant, the judge is not required to give at the request of the defendant a ruling that "the wilful and wanton negligence of which the defendant must have been guilty to make it liable . . . is a degree of negligence for which in a case resulting in death a jury in a criminal case could find a verdict of manslaughter."

TORT for personal injuries alleged to have been sustained when the plaintiff, a child ten years of age, was walking on a path upon premises of the defendant in that part of Boston called East Boston and fell against a pole which was charged with electricity. Writ dated December 6, 1909.

In the Superior Court the case was tried before *Wait, J.* The plaintiff's evidence tended to show the following facts: The defendant owned land, which was bounded southerly on Eagle Street in East Boston and northerly by the harbor, and upon which it maintained a car barn. On the easterly line of the lot there was a high board fence, separating it from vacant and unfenced land called the Rice lot and running to a ridge near high water

mark, where it turned and ran on the defendant's land and on or nearly on the ridge with various turns to the barn. Running across the Rice lot and just outside of the fence just described to the water, was a well defined path which with the defendant's knowledge and acquiescence for many years had been used by the children and others in the neighborhood to get to the water and flats for play and other purposes. Right beside the path and between it and the fence and about nine feet from a turn in the path near the crest of the ridge, the defendant maintained a pole with wires upon it. The plaintiff was walking along the path toward the water at six o'clock in the afternoon on September 1, 1909, which was a wet day, when she was tripped by some wires in the path and fell against the pole, receiving an electric shock and burns. At about one o'clock on the same afternoon a boy had received a shock from the same pole and he and his playmates had told one Sullivan that the pole was charged. The boy testified that Sullivan stated to him and his companions, "Oh, get out of here. What are you, fooling?" and that he replied, "No." He described Sullivan's duties as telling "the conductors which place the cars would go, where to put their cars."

An electrical engineer testified that the fact that the pole was charged indicated that the wires, which carried the voltage normally and which were insulated from the pole, had become defective in their insulation so that the current got out of the proper channel and got into the pole, either by the breaking down of the insulation or by the breaking of a wire carrying a current which might actually touch a pole, that if the contact through the earth was not good, then the pole would be charged; that under such conditions there would be more danger of getting a shock in wet weather; and that it was not difficult to ascertain whether the insulation was defective.

At the close of the evidence the defendant asked the presiding judge to order a verdict for the defendant. The request was refused.

The ninth ruling requested by the defendant and referred to in the opinion was as follows: "9. The wilful and wanton negligence of which the defendant must have been guilty to make it liable in this case is a degree of negligence for which in a case resulting in death a jury in a criminal case could find a verdict of manslaughter."

Material portions of the charge to the jury were as follows:

"One of the questions which arise in this case is as to whether this little girl had any rights upon the property where she was, if she stood in any such relation to the defendant . . . that any duty was owed to her. If she was a trespasser there was no duty owed to her except the duty to refrain from wanton and reckless injury to her. If she was invited to go upon the premises, then a different situation may exist, and it is possible that in this case you may have to consider just exactly what her position was.

"The only possible ground upon which you can say that she was invited there, or was permitted to be there — there isn't any evidence that she was invited to go there — whether or not she was permitted to go there depends simply upon this: the only evidence there is in this case which can justify you in finding that is that you find that the fence at the rear of that property was placed where it was so as to enable people to go behind it along the top of the bank; that there was a path there, and that the fence was put where it was, as counsel has just argued to you, in order to let the path be where it was and to allow people to use it. Now, is that the fact? Was the fence placed as near the edge of the bank as it could reasonably be placed and stand safely, or was it put where it was so that people might be at liberty to pass behind it, people whom the owner of the land anticipated would go over the land and would be permitted to go over the land?

"If people were allowed to go there, if the fence was arranged in such a way as in substance to extend an invitation to go across that path, if the path existed there, then the person allowing it would be bound to use the care of a reasonably prudent and careful person to guard against injury to people there from any unexpected or new danger. . . .

"Unless that is made out by a fair preponderance of the evidence, then this little girl was a trespasser; that is to say, she was a person that went there without any right; and in that case the only duty which was owed to her, as I have just stated to you, was that the defendant should not wilfully or wantonly injure her; so that what she would have to prove in that case if she were to recover is that there was a leaking of electricity into the pole there, that that caused her injury, and in addition to that she must show that the defendant had knowledge of that condition and that

it was wanton and wilful recklessness to allow this condition to continue to exist.

"Now, wanton and wilful recklessness means something more than just simple ordinary carelessness. It means something more than what is sometimes referred to as gross negligence. It means either an intentional causing of injury, about which there is no claim in this case, unless you are to take the argument of the plaintiff's counsel that the defendant company arranged that wire, which has been testified to here, for the purpose of giving shocks to people that were trespassing upon their premises. If you think that is so, why, then you can say that there was an intentional causing of injury or such a disregard of the possibility that people would be injured that it indicated a lack of care whether any one was hurt or not, and under such circumstances that the person who was in that state of mind realized that injury was extremely probable unless precaution was taken.

"If, for instance, gentlemen, I have under my control some extremely dangerous thing and know that a careless act on my part in the caring for it is likely to cause serious injury to other people, and I say to myself with regard to doing one thing or another in regard to it, 'Well, let her go, I don't care,' and then somebody is hurt, you would be justified in saying that I did not care if somebody was hurt, that I had realized the possibility of their being hurt, and that rather than take the trouble to guard against it I had said that I did not care. It would indicate a carelessness on my part as to whether anybody was hurt or not, and I would then be wantonly careless and I would be held liable if somebody was hurt in consequence of my act.

"But if, knowing I had such a thing under my control, having no reason to suppose that anybody was coming anywhere near it to get hurt, and that there was any serious danger of anybody being hurt, I should fail to do some particular thing which might make it additionally secure, you would not be justified in saying that I was wantonly careless, because there would be nothing to indicate that I had considered it probable that people would be hurt and that I was disregarding that probability. The essential thing in what the law calls wilful and wanton neglect is the recognition of the possibility of harm, and carelessness to that possibility.

"The plaintiff would have to satisfy you in this case then, if

she was a trespasser, that there was a knowledge of a dangerous condition existing upon the premises at the time, a probability of extreme injury to anybody if that danger were not guarded against, and a failure to guard against it. . . .

"Even if you should believe that the pole or wires, or both, had been in a dangerous condition, by reason of electrical leakage, or otherwise, for some days prior to the accident, and that knowledge of that fact had been communicated to the witness Sullivan, such evidence would not be sufficient evidence of wilful and wanton conduct on the part of the defendant in not removing the danger prior to the accident, unless you are satisfied that the witness Sullivan was a person in charge of the premises and who in the ordinary course of his duty was charged with seeing that the premises were safe."

The jury found for the plaintiff in the sum of \$10,000; and the defendant alleged exceptions.

The bill of exceptions, exclusive of annexed exhibits, filled sixty-three pages of the printed record. Thirty-nine pages were occupied by testimony of fifteen witnesses for the plaintiff and twelve witnesses for the defendant, set out almost entirely in question and answer form.

W. G. Thompson & S. E. Wardwell, for the defendant.

F. J. Daggett, (*J. T. Cassidy* with him,) for the plaintiff.

SHELDON, J. This bill of exceptions is of a kind that is becoming too frequent, — so frequent as to suggest that if persisted in it may call for drastic action to be taken by the court of its own motion. It is such a bill as ought not to have been presented or allowed. It calls for undue effort on the part of the court to pick out the few important facts from the undigested mass of irrelevant and impertinent facts with which they are covered up. See *Cornell-Andrews Smelting Co. v. Boston & Providence Railroad*, 215 Mass. 381, 387, and cases there cited; *Isenbeck v. Burroughs*, 217 Mass. 537. That there was no necessity for so voluminous a bill is manifest from a reference to the briefs of counsel, in each of which the material facts and evidence and the questions of law raised thereon are set forth with ample fulness but in a very much smaller compass than was taken for the exceptions. We shall not attempt in dealing with such a bill to do more than state the conclusions which we have reached.

We find no evidence that it was in consequence of an invitation or inducement from the defendant, express or implied, that the plaintiff went upon the defendant's land to the place where she was injured. There was evidence that the defendant had permitted the use of this path by children and others living in that neighborhood or coming thither, including the plaintiff, but nothing more than this. She had while she was on the defendant's premises merely the rights of a licensee. The defendant, so far as appeared, had not laid out or wrought the path for use as a way by any one; and such cases as *Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 368, and *Holmes v. Drew*, 151 Mass. 578, have no application. The fact, which the jury might infer from the evidence, that the defendant suffered its premises to be in a condition which was likely to attract people and did attract the plaintiff, does not constitute even an implied invitation. *Wright v. Boston & Albany Railroad*, 142 Mass. 296. *Daniels v. New York & New England Railroad*, 154 Mass. 349. *Gay v. Essex Electric Street Railway*, 159 Mass. 238, 241. *Holbrook v. Aldrich*, 168 Mass. 15, 16. *Brayden v. New York, New Haven, & Hartford Railroad*, 172 Mass. 225, 226. *Griswold v. Boston & Maine Railroad*, 183 Mass. 434. *West v. Poor*, 196 Mass. 183. *Norris v. Hugh Nawn Contracting Co.* 206 Mass. 58. The defendant owed therefore no other duty to the plaintiff than to abstain from any wilful, wanton or reckless conduct that was likely to do her injury. That is, the plaintiff had no right of action, unless she could show that her injury was due to the wilful, wanton or reckless misconduct or negligence of the defendant or of the defendant's servants in charge of the place, or to actual force used against her by them. *Stevens v. Nichols*, 155 Mass. 472, 475. *Byrnes v. Boston & Maine Railroad*, 181 Mass. 322.

But in our opinion there was evidence from which it could be found that the plaintiff's injury was so caused. There was evidence which warranted a finding that Sullivan was a servant of the defendant whom it had put in charge of these premises, and that before the happening of the accident Sullivan had been warned that electricity was escaping from the defendant's wires into the pole. This was a source of concealed danger to children and others who, as the jury could find, were in the habit of going by the path past the pole with the knowledge and by the license of the

defendant. The situation was such, and was known by the defendant to be such, as the jury could find, as to bring those children in passing by the pole into close proximity to it and very likely into actual contact with it. The defendant through Sullivan had notice that they were exposed to imminent danger from the escape of electricity. It is a matter of common knowledge that electricity is a highly dangerous force or substance, and the resulting danger to life or limb could be taken to have been known to the defendant. It is as if the defendant for its own purposes lawfully had kept there a store of gunpowder or of dynamite, safe while kept as it should be, and then, with knowledge that circumstances had arisen which caused serious danger of an explosion, had permitted or licensed people to pass in that immediate vicinity without giving them any warning against the danger to which it thus consented that they ignorantly should expose themselves. The force which the defendant knew was liberating itself in and around the pole was one which the defendant had brought thither for its own use. It was harmless while confined to the system of wires which the defendant had provided for it. It was no less dangerous than a wild and ferocious animal would have been, if allowed to escape from those wires into the pole. The defendant had notice that the electricity was escaping, and yet neither withdrew the license which it had given for the use of the path, nor made any effort to guard against the danger which it was creating. Under such circumstances the jury could say that its negligence was wanton or reckless. Its conduct in doing nothing to withdraw the license which it had given, or to check the escape of electricity which constantly was creating a new danger and one more than ordinarily serious, or to give any warning to those who were using the path by its license, could be found to be intentional conduct through its authorized representative, such as had a natural tendency to injure others, which was known or ought to have been known to the defendant, accompanied by a wanton and reckless disregard of its probable consequences. *Banks v. Braman*, 188 Mass. 367 and 192 Mass. 162, note. *Yancey v. Boston Elevated Railway*, 205 Mass. 162, 171. *Davis v. Boston & Northern Street Railway*, 214 Mass. 98, 101. We of course do not mean to say that the facts were as we have above stated, or even that such findings would have been in

accordance with the weight of the evidence. It is enough for us that there was some evidence to sustain them. It follows that the case was for the jury.

The charge to the jury was a very able and careful one. But it allowed them to find that the plaintiff was upon the defendant's premises by its implied invitation. We cannot say that the verdict rendered for the plaintiff did not rest upon such a finding; and therefore there must be a new trial.

The defendant has no right of exception to the refusal of the judge to give its ninth request. If given, it would have been necessary for the judge to explain to the jury the rule of responsibility for manslaughter caused by criminal negligence; and that might have tended to confuse rather than to help them. The instructions given them as to what would constitute wanton or reckless negligence were full and accurate.

It is not necessary to discuss the other matters which have been argued. It does not seem likely that the questions will arise again in the same way. It is enough to say that we find no material error other than what has been stated.

Exceptions sustained.

OLD COLONY STREET RAILWAY COMPANY *vs.* BROCKTON AND
PLYMOUTH STREET RAILWAY COMPANY.
SAME *vs.* SAME.

Norfolk. March 13, 16, 1914. — May 23, 1914.

Present: RUGG, C. J., LORING, SHELDON, & CROSBY, JJ.

Contract, Construction, Performance and breach. Joint Tortfeasors. Reference and Referee.

In a contract in writing relating to the operation of cars of one street railway company upon the tracks and by the servants of a second street railway company, in which it was provided that the second company should be liable ultimately for all damage caused by its negligence or that of its servants, provided that such damage was not caused by faulty construction or lack of repair of the cars of the first company, the second company further agreed to indemnify the first company for all damages suffered by it or for which it should be held responsible and for which the second company thus had made itself liable, and the first

company agreed to indemnify the second company for all damages for which it should be held responsible, where such "damage has been occasioned in a manner to render . . . [the first company] . . . liable as provided herein." By reason of the combined negligence of the first company in suffering an axle of one of its cars to be out of repair, and of the servants of the second company in running the car at an excessive rate of speed, several persons received injuries for which they made claims against the second company. The second company settled such claims. *Held*, that the second company had no right under the contract to compel the first company to pay to it any part of what it had so paid in settlement, because the agreement dealt only with damage which was due to the fault of one company without fault on the part of the other.

Where claims for damages for personal injuries are made upon one of two street railway companies whose joint negligence caused the injuries and such company settles the claims, it has no right of action in tort against the other company to compel it to pay any part of the money it paid in such settlements.

A contract in writing between two street railway companies relating to the running of cars of the first company upon the tracks and by the servants of the second company, after providing in substance that the first company should be liable ultimately for damages resulting from faulty construction or want of repair of its cars and that the second company should be liable ultimately for all damage resulting from negligence of its servants, further provided in substance that, if the companies were unable to agree as to which company was liable under the contract for any injury or damages, a claim for which had been settled and paid out of court, the controversy should be determined by an attorney at law to be agreed upon by the two companies, who should have power to apportion the liability between the two companies in such a way as he should deem just and equitable and whose determination should be conclusive upon both companies. The second company paid money in procuring settlements, upon terms which the first company approved, of certain claims made upon it for personal injuries and damages caused by the combined negligence of the first company in suffering one of its cars to be out of repair and of servants of the second company in running the car at an excessive speed, and thereafter the first company refused to proceed before an attorney at law chosen by the companies in accordance with the provisions of the contract, and the attorney at law did not make any apportionment of liability between the companies. *Held*, that the second company could not maintain an action at law upon the contract to compel the first company to pay any portion of the sums so paid by it before the matter was referred to the attorney and determined by him, because to permit the maintenance of such an action would be to make a new contract for the parties and to substitute the court for the referee selected and agreed upon by them.

TWO ACTIONS OF CONTRACT OR TORT, seeking, under the provisions described in the opinion of a contract between the plaintiff and the defendant relating to the running of the defendant's cars by the plaintiff's employees over the plaintiff's tracks from a certain point in Whitman by a designated route into Brockton, for reimbursement for certain sums paid by the plaintiff in settlement of

actions brought against it by reason of the derailment of a car of the defendant alleged to have been caused by an axle which, owing to negligence of the defendant, was allowed to be used in a defective condition. Writs dated November 11, 1910, and June 27, 1911.

The cases were referred to R. D. Weston, Esquire, as auditor, and afterwards were heard together, without a jury, by *McLaughlin, J.*

The judge made findings of fact which in substance were as follows:

A car belonging to the defendant, while being operated on the plaintiff's track by the plaintiff's servants under the agreement described in the opinion, left the rails on the straight rail, at a point a little beyond the curve at Salisbury Square in Brockton and came violently into collision with the curbstone of a sidewalk, and some of the passengers sustained serious injuries. A considerable number of actions at law were brought against the plaintiff by such passengers, and the plaintiff sought in these actions to recover the amounts it paid in satisfaction of their claims and the expense of the actions.

Acting under the provision of the contract, described in the opinion, relating to the hearing and determining, by an attorney to be selected by the parties, of the question, which of the parties should be liable finally for damages resulting from accidents described in the contract, the parties agreed upon James D. Colt, Esquire, as a disinterested attorney at law, to act as arbitrator in the case of an action brought by one Mary A. Cavanaugh, an injured passenger, against the present plaintiff arising out of this accident. Mr. Colt attended the trial of that case. The trial resulted in a verdict for the plaintiff in that action, (which subsequently was set aside by the presiding judge and a new trial ordered,) and that action and several claims arising out of the same accident then were compromised by agreement of the parties without any further trials upon terms of which the defendant in the present actions approved. The amount of payments made and expenses incurred in connection with such settlements was \$38,378.39.

The plaintiff was ready and offered to proceed before Mr. Colt as arbitrator, but the defendant refused to do so; and thereupon the plaintiff brought the first action. The second action is to re-

cover additional payments made later. It was not contended by the defendant that the provisions in the contract relating to the submission of disputed matters to an arbitrator is a defense to these actions; and the plaintiff contended that the judge should determine the liability with the same powers that an arbitrator would have had, if the matters in dispute had been submitted to him.

The findings of the judge continued as follows: "The derailment and subsequent collision with the curbstone were the result of two equally co-operating and contributing causes. One was the fact that at the time of the derailment the car was being operated at a negligently excessive rate of speed; the other was the breaking of an axle, which occurred immediately before or simultaneously with the derailment, an old crack therein culminating in a complete fracture. The derailment would not have occurred if the car had been run with a proper degree of care, nor would it have occurred if the axle had been in proper condition. Having in mind the high degree of care which under the circumstances the defendant company was bound to exercise, I find that the defect in the axle arose from, or had not been discovered or remedied, in consequence of the negligence of the defendant company.

"I find for the defendant. If upon the facts as I have found them and under the terms of the agreement I have the right to find the defendant liable and to apportion the damages, then I apportion them equally, and find for the plaintiff in the sum of \$11,008.15 in the first case, with interest from November 11, 1910, and in the sum of \$8,181.14 in the second case, with interest from June 27, 1911, these dates being the date of the writ in each case respectively. I make this apportionment upon the basis that the two causes named contributed equally to the result, and that each company was equally to blame."

The judge reported the cases to this court for determination.

W. D. Turner, (*G. Hoague* with him,) for the plaintiff.

T. Hunt, for the defendant.

SHELDON, J. The agreement between these parties substantially provided in the first place that when cars of the defendant were operated upon the plaintiff's tracks in charge of the plaintiff's servants, the plaintiff should be ultimately liable for all damage

caused by its negligence or that of its servants, provided that it was not due to faulty construction or lack of repair of the defendant's cars or the mechanism, machinery or appliances thereof; and the plaintiff agreed, upon certain conditions, to indemnify the defendant for all damages suffered by the latter or for which the defendant should be held responsible for which the plaintiff thus had made itself liable. The defendant on its part agreed, upon conditions not now material, to indemnify the plaintiff for all damages for which the plaintiff should be held responsible, "where such injury or damage has been occasioned in a manner to render . . . [the defendant] liable as provided herein."

The accident in question was due to two causes acting together: the excessive speed of the car due to the negligence of the plaintiff's servants; and the defective condition of the axle of the defendant's car, which condition was due to the negligence of the defendant. That is, the accident was due to the combined effect of the negligence of both parties, and cannot be attributed to the negligence of either one of them alone.

Under these circumstances, we think it plain that upon that part of the agreement which we have stated the action cannot be maintained. The case is not covered by that clause of the agreement, giving to it its broadest construction against the defendant; for at most it dealt only with accidents which were due to the fault of one party rather than of the other. Nor can there be a recovery in tort; for where, as here, both of the parties are at fault, the loss must rest where it has fallen. *Churchill v. Holt*, 131 Mass. 67, 69. The plaintiff has contended indeed that the excessive speed of the car was not the proximate cause of the accident, but merely a condition which contributed to it, and but for whose existence it perhaps would not have happened. *Snow v. New York, New Haven, & Hartford Railroad*, 185 Mass 321. *Gibson v. International Trust Co.* 186 Mass. 454. *Bellino v. Columbus Construction Co.* 188 Mass. 430, 433. *Stone v. Boston & Albany Railroad*, 171 Mass. 536. But the judge found, with manifest reason, that the excessive speed was one of the proximate causes of the accident; that the accident was directly due to the negligence of both parties as its proximate causes. That finding we cannot revise.

But the agreement contained further provisions. There was a stipulation that at the trial of an action brought against either of

the parties, in which the defendant therein claimed that the other might be liable, some attorney to be selected by their counsel should attend and follow the testimony, and in case of a verdict for the plaintiff therein hear such additional evidence as might be offered by either company and decide which one of these parties should be finally liable. The agreement then contained these further clauses: "If such attorney should be of opinion, in any case submitted to him hereunder, that the accident in respect of which the suit is brought and tried was the joint result of negligence on the part of the Old Colony Company [the plaintiff], its agents or employees, and of the defective condition of the Plymouth Company's [the defendant's] car, he shall have power to apportion the liability between the two companies in such manner as he shall deem just and equitable, and they hereby agree to pay such proportions of any judgment recovered by the plaintiff in such case as he shall award against them respectively. If the parties, by their respective counsel, shall be unable to agree as to which company is liable, under the provisions of this contract, for any injury or damages occurring, suit or claim for which shall be settled and paid without trial or out of court, both companies hereby agree to let the question be determined by a third person, some attorney at law agreed upon by their respective counsel for the purpose; and they will abide by his determination as conclusive."

The suits and claims against the plaintiff growing out of this accident were settled, not by trials, but by adjustments made between this plaintiff and the respective parties who made those claims. The first action was indeed tried in court, and Mr. Colt was selected by the parties and attended the trial. A verdict therein was rendered against this plaintiff, but the judge set it aside and ordered a new trial. Thereupon this plaintiff made a settlement of all the suits and claims pending against it by reason of this accident, but upon terms approved by this defendant. This defendant then refused to proceed before Mr. Colt as an arbitrator under the stipulations above quoted, and the plaintiff brought this action.

The agreement between these parties as to the adjustment between themselves of actions brought against either party by reason of accidents which were the joint result of the negligence of both of them is that the arbitrator appointed to attend the trial of such

suits and determine which one of the parties was ultimately responsible may, if he finds that both were at fault, apportion the damages between them in such manner as he shall deem just and equitable. If we assume in favor of the plaintiff that this stipulation applies to cases like the present, in which no trial or a merely fruitless trial was had, yet the fact remains that there is here no agreement that in cases where both parties are at fault the damages shall be apportioned justly and equitably between them. The agreement is merely that the arbitrator shall have power to apportion them according to his view of what is just and equitable; and the court has no means of determining whether he would exercise that power or what his individual view might be. *Munson v. Straits of Dover Steamship Co.* 102 Fed. Rep. 926. The judgment of a judge or jury cannot be substituted for that of the arbitrator. This is an action at law. The rule at law is well settled that in such a case as this there could be no contribution, no apportionment, between these parties. A court of law cannot say that this rule, established and constantly adhered to, can be departed from or altered or varied, except so far as the parties have agreed that it shall be. These parties well may have been willing to leave the question to the determination of a lawyer selected by themselves, presumably not only for his knowledge of the law, but for his practical familiarity with street railways whereon cars are propelled by electricity and with all the machinery and appliances used for that purpose. But this does not imply a consent that the same question, with all the sound judgment and all the technical knowledge that it may demand, should be left to the determination of an ordinary jury or of a judge, who, however great his knowledge of the law might be, would be scarcely likely to combine with that knowledge the trained skill of experienced electricians and railway men. There is no agreement like those which were considered in such cases as *Humaston v. Telegraph Co.* 20 Wall. 20, or *Dinham v. Bradford*, L. R. 5 Ch. 519. The defendant has not received property from the plaintiff, which according to the ordinary rules of law should be paid for by the defendant, and we have not a merely subsidiary agreement for fixing a price by arbitration, so that justice can be done by ascertaining the value of what the defendant has obtained at the expense of the plaintiff. Here the parties have agreed that upon certain conditions the ordinary rule of law shall not govern the adjustment

of their affairs; and we cannot say that their agreement shall be extended beyond the scope of those conditions. The reasoning of the court in *Deerfield v. Arms*, 20 Pick. 480, though upon different facts, is applicable here. No more than in that case can we give to the agreement of the parties an effect for which they did not choose to stipulate. It is true, as the plaintiff has contended, that all agreements, if possible, are to be construed so as to give them effect, and so as to be in harmony with law and justice. *Noonan v. Bradley*, 9 Wall. 394. *Merriam v. United States*, 107 U. S. 437. *In re Dunkerson & Co.* 4 Biss. 227. *Watts v. J. B. Camors & Co.* 10 Fed. Rep. 145. *McElroy v. Swope*, 47 Fed. Rep. 380. *Collis v. Emett*, 1 H. Bl. 313. *Russell v. Phillips*, L. R. 14 Q. B. 891, 901. But that principle does not authorize us to make a new contract, or to bind parties to terms beyond the fair meaning of the language which they have used. *Jessel, M. R., in Smith v. Lucas*, 18 Ch. D. 531, 542.

The result is that the plaintiff cannot maintain its actions. We do not need to discuss the specific rulings made by the judge at the trial. We find no error in any of them. Judgment must be entered for the defendant on the finding in its favor.

So ordered.

REUBEN WENTWORTH *vs.* MANHATTAN MARKET COMPANY
& another.

Middlesex. March 27, 1914. — May 23, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Equity Jurisdiction, Damages. Damages, In equity. Contract, Performance and breach, Construction. Evidence, Competency.

Where, in a suit in equity seeking to enforce specifically a contract contained in a lease and agreement in writing by which the lessee agreed to erect on the plaintiff's land a building there described, it has been decided by this court that, by reason of the action of the parties caused by their different interpretations of the agreement as to the size and character of the required building, it would be inequitable to enforce the defendant's agreement specifically, and the case is sent to a master for the assessment of damages, the fact that the defendant was right as to the dimensions and character of the required building and that

the plaintiff was wrong in asking for a different one, does not absolve the defendant from his liability in damages for his failure to erect any building at all.

Where in a suit in equity to compel the specific performance of a contract this court has decided that the enforcement of specific performance would be inequitable and has ordered the assessment of damages, the court of equity in which the case is pending, having acquired jurisdiction of the case, will retain it for the assessment of damages, although the damages might have been recovered in an action at law.

Where in a contract in writing collateral to a lease the lessee has agreed to erect a certain building "in a manner satisfactory to" the lessor and "in a manner to the reasonable satisfaction of the" lessor, these expressions are to be construed to have the same meaning, and to mean that the work is to be done in such a way as reasonably ought to satisfy the lessor.

Upon the assessment of damages in a suit in equity brought by a lessor against his lessee for the breach of an agreement collateral to the lease to erect a certain building upon the leased premises, to be completed at a date just before the filing of the bill, which the lessee should have the right to occupy on payment of a stipulated rent until the termination of the lease eight years later, where the master has made a finding as to the reasonable cost of such a building at the time named for its completion, the amount thus found by him should be reduced so that the plaintiff may recover as damages only a sum equal to what would be the present worth of such a building subject to the lease.

Upon the assessment of damages in a suit in equity brought by a lessor against his lessee for the breach of an agreement collateral to the lease to erect a building upon the leased premises to be completed by a certain day, it appeared that the lease and agreement contained a provision that after the day fixed for such completion an increased rent should be paid in monthly instalments, that owing to a difference of opinion between the parties as to the proper interpretation of the provision in regard to the size and character of the building required to be built, no building was erected, that by a decision of this court it was determined that the defendant was right as to the kind of building required to be erected, but that he had committed a breach of the agreement by failing to erect a building of any kind. *Held*, that, as a part of the damages, the plaintiff was entitled to recover the increased rent from and after the date of the rescript of this court together with interest at the rate of six per cent per annum on each monthly instalment as it became due in case it remained unpaid.

In a suit in equity, at a hearing before a master for the assessment of damages for the failure of a lessee to erect a certain building on the leased premises as he had agreed to do by an agreement in writing collateral to the lease, upon the question of determining the reasonable cost of erecting such a building, it is proper for the master to exclude evidence offered by the defendant to show that before the time when the building was required to be completed the defendant received a bid in writing from a responsible person, which he did not accept, to erect the required building for a sum named, the master having found that the bid offered in evidence was based on a plan and specifications that contained errors and omissions.

BILL IN EQUITY, filed in the Superior Court on July 19, 1912, seeking, among other things, to have the defendants ordered to

perform specifically their agreement under a certain lease and contract in writing by erecting a building upon the leased premises, and by conveying in fee a certain right of way, and seeking also to have the defendants enjoined from maintaining a stable on the leased premises, and for damages.

By a rescript of this court issued on January 9, 1914, in accordance with a decision reported in 216 Mass. 374, it was ordered that the case be sent to a master to assess damages. The case accordingly was referred to Burton Payne Gray, Esquire, as master, to hear the parties and assess the damages in accordance with the opinion of this court. The master found that the erection of such a brick building as was required by the contract, without plastered walls, without a roof, and with a wooden floor, which would be suitable for carrying on the defendants' business and should be reasonably satisfactory to the plaintiff, would be \$4,020.05; and, among other things, found that the defendants were liable to the plaintiff for rent at the rate of \$2,500 a year from June 1, 1912, as reserved in the lease, with accrued interest on each monthly installment as it became due under the lease.

The plaintiff filed the following exceptions to the master's report:

"1. To his ruling that the language of the lease and agreement calls for a brick building to be completed without a roof.

"2. To his ruling that the language of the lease and agreement calls for a brick building to be completed without plastered walls."

The defendants filed the following exceptions to the master's report:

"1. To the ruling or conclusion contained in the first paragraph of his findings, to the effect that there has been a breach of the contract on the part of the defendants, and to his failure to rule in that respect that whatever breach may have occurred was that of the plaintiff.

"2. To his ruling that the plaintiff is entitled to recover substantial damages.

"3. To his ruling that the measure of damages is such sum of money as it would have cost to erect the brick building in question on or before June 1, 1912, as provided in the lease and agreement.

"4. To his refusal to rule that if the cost of the building is the measure of damages, it should be reduced by such sum as would

represent reasonable interest on the amount of the award from the date of payment to the termination of the lease.

"5. To his ruling that the language of the lease and agreement calls for a wooden floor in the building and for suitable finish about the door and windows.

"6. To his exclusion of the offer of proof made by the defendants as to the bid for erecting the building for the sum of \$3,007.

"7. To his refusal to find and rule that this bid was the limit of the defendants' liability for damages, so far as the cost of the building is concerned.

"8. To the method by which the master found, as stated in his report, that it would cost the sum of \$4,020.05 to erect the building in question.

"9. To his admission of the letter of January 26, 1914.

"10. To his ruling that the defendants are liable for rent at the rate of \$2,500 per annum from June 1, 1912, as reserved in the lease, with accrued interest on each monthly instalment as it became due under the lease.

"11. To his ruling that the defendants are liable for rent from June 1, 1912, at the rate of \$1,000 per year, and to the method by which he arrived at this figure.

"12. To his ruling that, if the defendants are liable for rent only at the rate of \$700 per year, they are also liable for any interest thereon."

The case came on to be heard before *Jenney, J.*, and, at the request of the parties, was reserved by him for determination by this court upon the master's report on the assessment of damages and the exceptions of both parties thereto, together with the record of the previous appeal.

H. T. Richardson, for the defendants.

E. A. Whitman, for the plaintiff.

CROSBY, J. This case has been considered previously by this court. *Wentworth v. Manhattan Market Co.* 216 Mass. 374. After the rescript of this court and in accordance therewith, the case was recommitted to the master, who assessed the damages to be awarded to the plaintiff. At the request of both parties the case was reserved by a judge of the Superior Court upon the master's report upon the assessment of damages and the exceptions of both

parties thereto, together with the record of the previous appeal; such decree to be entered as law and justice may require.

The defendant contends that it is liable only for nominal damages for failure to erect the building upon the premises because of the language contained in the previous opinion (216 Mass. 380): "The plaintiff has refused to allow the defendant to erect one [a building] such as the contract provided for." The record shows that the plaintiff and the defendant were not in accord as to the size or character of the building that was to be erected. In other words, they differed as to the correct interpretation of the lease and contract which they had entered into. This court has decided that the defendant was correct in its interpretation of the agreement so far as it related to the dimensions and character of the proposed building. This does not, however, release or excuse the defendant from a failure to perform its contract, or, in the event of such failure, from responding in damages to the plaintiff. The language quoted from the opinion, that "the plaintiff has refused to allow the defendant to erect one such as the contract provided for," cannot be construed as meaning anything more than that the plaintiff refused to agree to the defendant's interpretation of the contract. The defendant has been in full possession and control of the premises ever since June 1, 1910, and there is nothing to show that it might not have proceeded with the construction of such a building as was called for by the agreement, and have fully completed it on or before June 1, 1912. It would be inequitable for the defendant to be relieved from liability for failure to perform the contract which it admits it entered into. Especially is this true in view of the following finding of the master: "That the defendant, after it secured a renewal of its lease of the quarters now occupied by it, which was during the two year period, at no time considered the erection of any new structure upon the premises leased by the plaintiff until after a demand from the plaintiff in the spring of 1912 for the erection of the building called for in the lease and agreement. The defendant then took up the question of the new construction, but went only so far as to determine what was the simplest building that could be constructed to satisfy its obligation under its covenant, and except for that there was no plan at any time to erect any building upon the plaintiff's land."

We are of opinion that the plaintiff is entitled to damages (1) by

reason of the failure of the defendant to erect the building, and (2) for failure to pay the rent stipulated in the lease. The plaintiff undoubtedly has a remedy at law for the recovery of whatever sums may be due him as rent under the lease, but as the bill is brought among other things to compel the specific performance of the contract, and as the court in the exercise of its discretion has determined that specific performance ought not to be ordered, but has determined that the proper relief to be awarded the plaintiff is that of damages, we see no reason why the rule in chancery practice in this Commonwealth should not be followed in this case and jurisdiction retained for the assessment of damages although the relief of specific performance has been refused. *Newburyport Institution for Savings v. Puffer*, 201 Mass. 41, 47. *Nickerson v. Bridges*, 216 Mass. 416, 421.

We are of opinion that the rulings and findings of the master under the paragraphs of his report numbered one and two are correct. The written agreement for the construction and finish of different parts of the building recites that the same is to be done "in a manner satisfactory to said Wentworth" and "in a manner to the reasonable satisfaction of the said Wentworth." These different forms of expression are to be construed as having the same meaning. They are to be considered as agreements to do the work in such a way as reasonably ought to satisfy the plaintiff. *Handy v. Bliss*, 204 Mass. 513, 519, 520. It seems plain that the defendant was not required to put a roof on the brick building upon which was to have been placed the three story wooden building. Nor can we say that the findings of the master that the building should have a wooden floor, that the walls were not to be plastered, and the other findings, including the finding that such a building would cost \$4,020.05, were plainly wrong. The finding as to the reasonable cost of the building is based upon the cost of such building before June 1, 1912, when, by the terms of the agreement, it was to have been completed, but as the defendant was entitled to the use and occupancy of the building, had it been erected, until June 1, 1920, the date when the lease, unless renewed, would expire, the plaintiff is entitled to recover as damages only a sum equal to the present worth of the building. That is to say, the fair cost of the building should be reduced to such a sum as with interest at six per cent per annum will produce the amount at the end of the term.

We are of opinion that in the absence of any evidence to the contrary, six per cent per annum, which is the legal rate of interest fixed by statute where there is no agreement for a different rate, would be reasonable interest in this case. R. L. c. 73, § 3.

It is to be observed that there is no evidence before the court as to the extent, if any, that the building would have depreciated in value at the time of the termination of the lease. No rent has been paid since June 1, 1912, and the question arises as to what sum should be paid from and after that date. The lease and agreement provided that the building to be erected upon the premises should be completed within two years from June 1, 1910, and that from and after June 1, 1912, the increased rental at the rate of \$2,500 should be in force. The evidence shows however that owing to differences between the parties as to the size, location and character of the building, no building has been erected, and the controversy between the parties as to the proper interpretation of the lease and agreement recently has been decided by the rescript filed in this case on January 9, 1914. The report of the master shows that the defendant seasonably before June 1, 1912, tendered performance by offering to erect such a building as the contract called for, but that the plaintiff refused to accept such a building.

Under these circumstances, we are of opinion that the rent reserved at the rate of \$700 a year from June 1, 1910, until the date of the rescript, is due and payable, together with interest at six per cent on each monthly instalment as it became due under the lease, and that from and after the date of the rescript for the remainder of the term of the lease the plaintiff is entitled to receive the yearly rental of \$2,500, payable in equal monthly payments in accordance with the lease, with interest at six per cent on each monthly instalment as it became due. It follows that the plaintiff's exceptions to the master's report must be overruled.

The defendant's exceptions have been largely disposed of by what has been said. The master was justified in ruling that there had been a breach of the contract on the part of the defendant. This follows from the previous opinion in this case. The defendant's first exception therefore must be overruled. As the plaintiff is entitled to recover substantial damages, the second exception is overruled. The third, fourth and tenth exceptions, for the

reasons already stated, must be sustained. The eleventh and twelfth have become immaterial. The master's finding that the defendant should lay a wooden floor and that there should be suitable finish about the doors and windows cannot be found to have been clearly wrong. Accordingly the fifth exception must be overruled. The eighth exception is overruled, as it does not appear what method the master adopted in making his finding as to the cost of the building, nor is the evidence before us upon which this finding was based. The letter of January 26, 1914, from the defendant's counsel to the plaintiff's counsel, would seem to have been immaterial upon the question of damages, which was the only issue before the master, but we fail to see how the defendant could have been harmed even if the letter was admitted wrongly. Accordingly this exception must be overruled.

The defendant's sixth and seventh exceptions relate to the exclusion of the defendant's offer to show that in the spring of 1912 it had a *bona fide* bid in writing from a responsible person to erect the building required for \$3,007. The master found that the bid which the defendant offered in evidence was based upon a certain plan and specifications prepared by the defendant's architect and contained certain errors and omissions.

We are of opinion that this evidence was incompetent. An unaccepted bid had no tendency to show the reasonable cost of the building in 1912. Accordingly the defendant's sixth and seventh exceptions must be overruled. *Peirson v. Boston Elevated Railway*, 191 Mass. 223, 233. *Doherty v. Hill*, 144 Mass. 465, 469. *Wood v. Firemen's Fire Ins. Co.* 126 Mass. 316, 319. *Dickenson v. Fitchburg*, 13 Gray, 546, 554.

A final decree in favor of the plaintiff in accordance with the foregoing, with costs, is to be entered; its form to be settled in the Superior Court.

Ordered accordingly.

MICHAEL COYNE vs. JOHN B. BYRNE.

Middlesex. November 19, 1913. — May 25, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Negligence, Employer's liability. Custom.

In an action by a workman against a building contractor by whom he was employed for injuries caused by the giving way of a spreader in the window frame of a building in process of construction, on which the plaintiff stepped in attempting to pass from a staging on the inside of an unfinished brick wall to a staging on the outside, in order that the proof of a custom among workmen to step on a spreader in going from an inside staging to an outside staging may affect the rights of the parties, such custom must have been uniform, universal and of such long continuance that all concerned might be presumed to know it, and consequently its existence would not make it the duty of the defendant to instruct a competent carpenter who had been in his employ for eight years that in putting in a spreader he must make it strong enough for the workmen to step on.

TORT, under the employer's liability act and at common law, by a workman for personal injuries sustained on January 31, 1910, when the plaintiff was in the employ of the defendant, who was engaged as a contractor in constructing a school building in the town of Stoneham. Writ dated April 16, 1910.

In the Superior Court the case first was tried before *King, J.* The jury returned a verdict for the plaintiff in the sum of \$2,500; and the defendant alleged exceptions, which were sustained by this court in a decision reported in 214 Mass. 221.

There was a new trial of the case before *Fox, J.* At the close of the plaintiff's evidence, which differed from that at the first trial only in the presentation of evidence in regard to an alleged custom as described in the opinion, the case was submitted to the jury under an agreement of counsel that on the coming in of the jury the judge might order a verdict for the defendant and report the case upon the stipulation that, if this court should hold that upon the competent evidence in the case the jury were warranted in finding for the plaintiff, judgment was to be entered for the plaintiff for the amount of damages found by the jury with interest from the date of the finding; otherwise, judgment was to be entered for the defendant.

The jury returned a verdict for the plaintiff in the sum of \$4,000, whereupon the judge ordered a verdict for the defendant and reported the case for determination by this court with the stipulation stated above.

F. J. Carney, for the plaintiff.

E. I. Taylor, for the defendant.

LORING, J. At the new trial consequent upon the decision made in *Coyne v. Byrne*, 214 Mass. 221, the defendant rested on the plaintiff's evidence.

The only difference in the evidence introduced at the two trials consisted in testimony given at the second (1) tending to show that there was a custom among workmen when going from the inside stage to the outside stage to "put up two hands and take hold of the outside plank, . . . step up on the end of the spreader and get right out on the outside stage;" and (2) that no warning was given to the carpenter who nailed the stay or spreader here in question in reference to making the stay or spreader safe for persons to go upon.

We do not find it necessary to consider whether the evidence introduced by the plaintiff went far enough to warrant a finding that there was a valid custom to the effect stated. Because to be valid and binding a custom "must be a custom of sufficiently long continuance, that all parties may be presumed to know it, it must be uniform, it must be universal," as was held in *Porter v. Hills*, 114 Mass. 106. For a later case see *Barrie v. Quinby*, 206 Mass. 259, 265. McInnes, the employee to whom the defendant left the work of putting up the stays or spreaders in the building here in question, had been in his employ eight years, and on the evidence he must be taken to have been a carpenter. If there was a uniform, universal custom of sufficiently long continuance so that all parties might be presumed to know it, it must have been as well known to McInnes as to the defendant, and the defendant had a right to assume that to be so. Under these circumstances there was no occasion for the defendant to give McInnes instructions to comply with the custom in putting up the spreaders. The defendant performed his full duty to the plaintiff when he furnished the proper materials and left the putting up of the spreaders to a carpenter of experience. See for example cases like *White v. Unwin*, 188 Mass. 490, and *Callahan v. Phillips Academy*, 180 Mass. 183.

There was no competent evidence warranting a verdict for the plaintiff, and by the terms of the report judgment must be entered for the defendant.

So ordered.

DANIEL J. KANE, administrator, vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 19, 1913. — May 25, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Negligence, In use of highway, Street railway, Causing death. *Evidence*, Weight. *Witness*, Contradictory statements.

If a traveller on foot starting to cross a city street thirty-five feet wide from curb to curb, on which are parallel street railway tracks, looks when he is five or six feet from the curb and sees a street railway car approaching, which is about one hundred and seventy-five feet away and which is running at very excessive speed, although the traveller does not appreciate this, and if, after going about fifteen feet farther, when he has seven feet more to go to get to a place of safety, he looks again and sees the car from thirty-five to ninety feet away and keeps on, not realizing until he gets between the third and fourth rail the excessive speed at which the car is moving, and then, realizing it, darts forward and is struck by the car and killed when he is on the farther rail and within two feet of a place of safety, in an action for causing his death these facts are affirmative evidence of his due care under the requirement of St. 1907, c. 392.

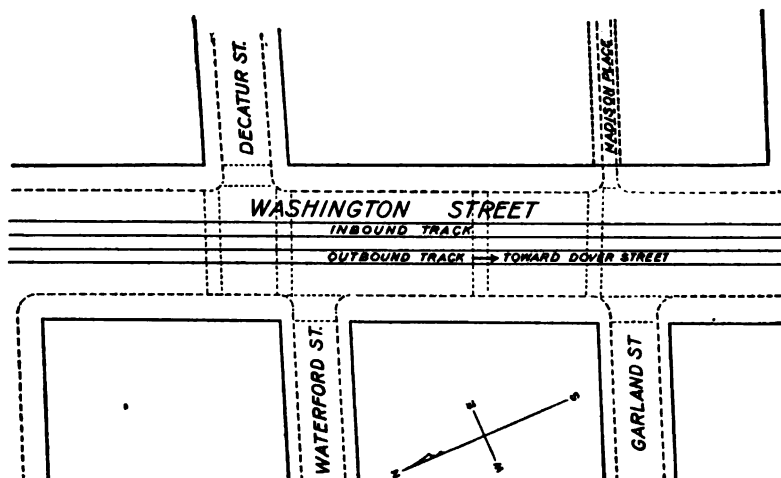
Where the only eyewitness of an accident resulting in death, on his direct, on his cross and on his redirect examination, makes contradictory statements in attempting to describe the circumstances attending the accident, it is for the jury to weigh his conflicting testimony and decide what the facts were. Following *Tierney v. Boston Elevated Railway*, 216 Mass. 283.

LORING, J. The only question presented by this bill of exceptions is whether there was evidence of due care on the part of the plaintiff's intestate within St. 1907, c. 392 (as to the meaning of which see *Bothwell v. Boston Elevated Railway*, 215 Mass. 467). There was evidence that the defendant's motorman was drunk and that the car which killed the intestate came faster than the eyewitness to the accident ever had seen an electric car go before.

The intestate was run over and killed on the farther rail of the inbound track as he was crossing from the west to the east side of Washington Street, in Boston, on the northerly cross walk of Deca-

tur Street as shown on the plan. The accident happened about half past ten o'clock in the evening of an August day.

The eyewitness testified that he saw the intestate look each way as he left the sidewalk to cross Washington Street; that he was then "three or four feet from the curb, or half way between the curb and the nearest rail." That the car was then one hundred and fifty



to one hundred and seventy-five feet away. That he looked again toward Dover Street after he crossed the first track, that is to say, the outbound track, and that when he looked the second time the car was "above" Waterford Street. It is agreed that it was thirty-five feet from the cross walk here in question to the middle of Waterford Street. On cross-examination the witness testified that the intestate looked but once just after he left the sidewalk. He also testified on cross-examination that when the intestate looked the first time the car was one hundred and fifty feet away. It is agreed that it was one hundred and forty-five feet from the cross walk here in question to the middle of Garland Street. The witness further testified that he did not realize that the intestate could not get across in safety until he was crossing the outbound tracks, and that at that time the car was "lots nearer" than it was when the intestate looked just after leaving the sidewalk, but he could not say how far off it was when the intestate was crossing the outbound tracks. On redirect examination the witness was asked

where the car was when the intestate started to cross the track "nearest to the side of Washington Street on which you were," and he answered at Waterford Street. As we have said, it is agreed that the distance from the middle of the cross walk here in question to the middle of Waterford Street is thirty-five feet. After a colloquy between counsel and the judge;* the judge asked the witness if he understood the question, and he said, "As I understood the question, — [it was] where was the car at the time that McFeeley [the intestate] was crossing between the third rail from the sidewalk that he left to the last rail nearest to the left-hand side where I was — where was he when he struck that track?" The examination then proceeded as follows: "Q. No, where was the car just before McFeeley started to cross the third rail from the other side of the street from where you were? A. That is, the rail nearest to his side? Q. Yes. A. At Garland Street." He was then asked: "Q. . . . When McFeeley started to cross the last track; that means he had already crossed from the right-hand side of Washington toward Decatur — had crossed the first track and come to the second track, which was the nearest track to you. A. Yes, sir. Q. At the time when he started to cross that track where was the car with reference to any object or street or place? A. Well, the car at that time was about half way between Garland and where he was struck — Decatur Street." On the next day the plaintiff recalled the witness and asked him a question "as to the position of the car when McFeeley was between the outbound and the inbound tracks." The judge ruled that this question had been answered and that the question must be excluded unless the witness said that there was a mistake which he wished to correct. Thereupon the witness said that he had misunderstood the question; that when he said that the car was at Garland Street he meant the car was at Garland Street when the intestate started to cross the outbound tracks, and that the car was at Waterford Street when he started to cross the inbound tracks.

Washington Street at the point in question is thirty-five feet from curb to curb. From the westerly curb to the nearer rail of the outbound track is eleven feet. Each track is four feet eight and one half inches wide, and the space between the outbound

* *Sanderson, J.*

and inbound tracks is five feet wide. It follows that, allowing two feet for the overhang of the car, the intestate had a little more than twenty-seven feet to go from the westerly curb to a place of safety beyond the inbound track.

It was for the jury to decide on these contradictory statements what the facts in the case were. On that point, *Tierney v. Boston Elevated Railway*, 216 Mass. 283, is decisive.

The jury could have found that the intestate looked when he was five to six feet from the curb of the westerly sidewalk (that is to say, when he had twenty-one feet to go to get to a place of safety), and that the car was then about one hundred and seventy-five feet away, that is to say, some distance above Garland Street. That after going some fifteen feet (to the nearer rail of the inbound track) and when he had seven feet more to go to get to a place of safety he looked again and the car was distant from thirty-five feet (Waterford Street) to ninety feet (half way between Garland and Waterford Streets). That he kept on and was struck on the farther rail of the inbound track when he was within two feet of safety. Finally, that in the words of the eyewitness, "he did not realize that the car was coming as fast as it was, and he did not realize it until he got between the third and fourth rail, and the minute that he realized it he darted forward, and as he darted forward he was struck by that car." On the question of the due care of the intestate also, *Tierney v. Boston Elevated Railway*, *ubi supra*, is decisive.

Exceptions overruled.

F. M. Ives, for the defendant.

J. H. Vahey, (*D. J. Kane & P. Mansfield* with him,) for the plaintiff.

TIMOTHY MURPHY vs. JEFFREY J. O'CONNELL.

SAME vs. JEFFREY J. O'CONNELL, administrator.

Middlesex. November 20, 1913. — May 25, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Practice, Civil, Exceptions.

Where, upon an exception to the refusal of a presiding judge to make a ruling as to the legal effect of certain facts if they should be found by the jury, the evidence reported and described in the bill of exceptions does not warrant a finding of these facts by the jury, the exception must be overruled, because it does not appear that there was any occasion for the ruling requested.

LORING, J. These two actions were tried together. Both are brought to recover the reasonable value of services rendered by the plaintiff as janitor of a building owned by Hannah Connors during her lifetime. The defendant was administrator of her estate. The second action was brought against the defendant as administrator and covered a period of six years, seven months and a half before the intestate's death, while the first action was brought against the defendant personally and covered a period of two years and half a month after the intestate's death.

The plaintiff had a verdict in each action. Three rulings were asked for by the defendant at the trial.* The first † was given, and the second ‡ and third were refused. No one of the three was pertinent to the first action, that is, the action against the defendant

* Before *Keating*, J.

† This ruling was as follows: "1. In order to recover, the plaintiff is bound to satisfy the jury by a fair preponderance of the evidence that the defendant's intestate, Hannah Connors, entered into an agreement with the plaintiff whereby the plaintiff was to render certain services to be paid for by the defendant's intestate in her will."

‡ "2. If the jurors are satisfied that the plaintiff agreed with the defendant's intestate, Hannah Connors, to do the work performed by him in consideration of his receiving rent free the premises occupied by him in her building, and further find that the defendant's intestate stated to the plaintiff in connection with his making the agreement that she would leave him a legacy in her will, then their verdict must be for the defendant."

personally. Of the two rulings refused one only (the second) is now insisted upon: We treat the other as waived.

It is apparent from the bill of exceptions, which does not purport to set forth all the evidence, that the ground on which the plaintiff sought to recover in the action against the administrator was that he had been induced to perform the services performed by him by a promise of the intestate that he should be paid for them in part by a legacy in her will. It appeared that she died intestate. We infer that the defendant as administrator of her estate had set up in defense of the plaintiff's claim against the estate that the intestate's oral agreement to pay for the services by will was not binding by reason of R. L. c. 74, § 6; and thereupon this action had been brought to recover the value of the services which the intestate thus had secured without paying for them, under the doctrine explained in *Kelley v. Thompson*, 181 Mass. 122, and *De Montague v. Bacharach*, 181 Mass. 256; *S. C.* 187 Mass. 128.

The plaintiff testified that the intestate promised to pay him for his services in part by giving him a tenement for a part of the time at half the rent of it and for the rest of the time free of rent; and in part by leaving him a legacy in her will. The administrator introduced evidence that the trade between the intestate and the plaintiff was that he should perform the services performed by him in exchange for half the rent otherwise due for part of the period and for his whole rent for the rest of the period.

In the evidence put in by the plaintiff at the trial there was testimony to the effect that the intestate had said that the plaintiff "will not lose anything by it," meaning by "it" the work he was then performing for her. The defendant's contention is that by reason of this testimony and the fact that on the plaintiff's story no price for the plaintiff's services was agreed upon at any time, the jury could have found that the actual agreement was that the plaintiff was to be paid by the arrangement as to rent, and that what the intestate said as to a legacy was that she would leave him a legacy by way of a gratuity and not as part of the contract under which the plaintiff was to act as janitor for the building. And, if that was the fact, R. L. c. 74, § 6, was a bar to an action on the promise and the plaintiff could not recover on it or under the doctrine of *Kelley v. Thompson*, *ubi supra*. That

is to say, if the jury did so find, the verdict should be for the defendant.

We are of opinion that the evidence in the case did not call for an instruction on the legal result of such a finding. Under these circumstances it is not necessary to consider whether the second ruling asked for ought to have been understood by the judge to be a request for a ruling to the effect now contended for by the defendant. The result is that the exceptions must be overruled in both actions; and it is

So ordered.

The case was submitted on briefs.

C. A. McDonough, for the defendant.

D. T. Dickinson & A. S. Apsey, for the plaintiff.

HENRY W. MONTAGUE & another, trustees, *vs.* GEORGE D. SILSBEE & others.

Suffolk. December 5, 1913. — May 25, 1914.

Present: RUGG, C. J., LORING, BRALEY, & DE COURCY, JJ.

Contract, Construction. Power. Estoppel. Bankruptcy, Trustee. Words, "Heirs at law."

If a beneficiary for life under a trust created by will, who has a power of testamentary appointment over the trust fund which in default of such appointment will go to his heirs at law, declares, in order to procure a loan of money, that he has made a will by which he has appointed the trust fund to others and that such an appointment will make the appointed property assets for the payment of his creditors, this is not an agreement to make an appointment in favor of the lender of the money nor an agreement not to die intestate.

If a beneficiary for life under a trust created by will, who has a power of testamentary appointment over the trust fund which in default of such appointment is to go to his heirs at law, declares, in order to procure a loan of money, that he has made a will by which he has appointed the trust fund to others and that such an appointment will make the appointed property assets for the payment of his creditors, and afterwards dies intestate, this statement of the beneficiary for life can create no estoppel that will bind his heirs at law, who take the trust fund not from him but from the original testator; and, even if one of the heirs at law joined in making the statement to induce the loan, he would be estopped to deny merely that a will had been made and existed at the time of the statement and would not be precluded from showing that a will then in existence afterwards was revoked.

Under the bankruptcy act of 1898 as amended by U. S. St. 1910, c. 412, § 8, whatever the powers of a trustee in bankruptcy over the estate of the bankrupt may be, such a trustee cannot make an appointment under a power which was to be exercised by the bankrupt only by will, even when the bankrupt is alive, much less after he is dead.

LORING, J. By his last will and testament Nathaniel Silsbee left the residue of his estate in trust to pay the income in equal portions to two sons and a daughter, and "at the death of either or all of my children, their portion of the principal of this trust shall be paid over as he or she may have by their last will directed, and in default of such will to their heirs at law."

In June, 1912, the elder of these two sons (Nathaniel D. Silsbee by name) died intestate, and the defendant Bradish was appointed administrator of his estate. In the month of January next before his death he was adjudicated a bankrupt and the defendant Demelman was appointed trustee of his estate in bankruptcy.

Later this bill was filed by the trustees under the will of Nathaniel the elder, asking for instructions as to the persons entitled to the corpus of that portion of the trust fund, the income of which was payable to Nathaniel the son during his lifetime. One of the creditors of Nathaniel the son was made a party defendant, and three others intervened as claimants. A decree was made by the single justice * directing the trustees to pay the portion of the trust fund above mentioned to the widow and children of Nathaniel the son as his only heirs at law. Appeals were taken from this decree by the four creditors, by the administrator and by the trustee in bankruptcy. The case is before us on the evidence taken by the commissioner appointed at the hearing before the single justice.

The power of appointment given to Nathaniel D., the life tenant, was a general one. If he had desired to do so he could have made an appointment in favor of a particular creditor or of all persons who should be his creditors at his death, as to which see *Harmon v. Weston*, 215 Mass. 242. If to induce a creditor to lend him money he had made a valid agreement to exercise the power of appointment in his favor or in favor of all creditors including him, the question which has been argued by the appellants in the case at bar would have arisen. At most what took place was

* *De Courcy*, J.

an assurance by the life tenant that he had made a will containing an appointment in favor of third persons, and that he was advised by counsel that, under the law of Massachusetts, in case such an appointment was made, his creditors would have to be paid before his appointees took. Doubtless that statement of the law is correct where the appointees are volunteers. See *Clapp v. Ingraham*, 126 Mass. 200, and *Harmon v. Weston*, 215 Mass. 242, 248, where the intervening cases are collected.

The appellant creditors' contention is that these statements were made to induce them to lend money to the life tenant, and that a finding should be made that the life tenant thereby impliedly agreed not to revoke the will or at any rate not to die without having exercised the power of appointment. To that contention we are not able to assent. The question of exercising the power in favor of creditors never was broached. Yet an agreement to that effect would have been the way to secure payment to them out of the life tenant's portion of the trust estate, if that had been what was intended. In place of asking for that, the appellants took the statement of the life tenant that he had made a will by which he had appointed this portion of the trust estate to others, and that such an appointment by will would make the property appointed assets for the payment of his creditors. A will is ambulatory until death, and can be revoked at any time by the testator. That is common knowledge with which the appellant creditors are chargeable. Yet, knowing that, the creditors not only did not ask for an agreement binding the life tenant to make an appointment in their favor, but they did not ask him to agree not to die intestate. In saying this we have not overlooked the testimony given by Kirby that in 1897 or 1898 the life tenant did state to him that he would exercise the power by making a will. But that was six or seven years before the date of the first of the unpaid loans here in question made by Kirby to the life tenant. There was no evidence that such an assurance was repeated to Kirby when the money here in question was lent by him. Nor was there evidence that such an assurance was given to the other creditors. Why the appellants stood content with the statement that at the time of the loan a will had been executed which indirectly made the portion of the trust estate here in question assets for creditors by an appointment in

favor of third persons, is a matter of conjecture. But it is the fact that they did stand content with that statement and did not ask for an agreement which directly or indirectly should give to them a right to be paid out of the trust estate. We express no opinion upon the appellant creditors' contention that if such an agreement had been made it would have amounted to a defective execution of a power which equity would aid — as to which see *Coates v. Lunt*, 210 Mass. 314.

The appellant creditors' second contention is that, if these statements do not amount to an agreement, they create an estoppel; and they rely in this connection on *Langley v. Conlan*, 212 Mass. 135. So far as statements made by the life tenant are concerned, the answer to this contention is that the appellees, to whom the decree directs that the portion of the trust estate here in question shall be paid, are not the life tenant and do not take under him. They take as legatees under the will of the original testator. In default of appointment this portion of the trust estate was given to the heirs at law of the life tenant. The words "heirs at law" are not words of limitation, but of purchase. They are the *descriptio personarum* to whom the original testator bequeathed this portion of the trust property upon the death of the life tenant, in case the life tenant did not exercise the power of appointment given him by the will. The appellees take under the bequest, not under the life tenant. For that reason the appellees would not be bound by the estoppel, if these statements of the life tenant did create one.

But there was evidence that George D. Silsbee, one of the heirs of the life tenant, also made statements to the effect stated above, and that these statements were made in procuring loans to his father, the life tenant, and the creditors contend that however it may be with the other heirs at law George D. Silsbee is estopped. That evidence makes it necessary to decide whether these statements raise an estoppel. In our opinion they do not. These statements would preclude the person making them from showing that a will had not been made. It is admitted that a will had been made, and on the evidence that will had been revoked. What the creditors are seeking to make out by their claim of an estoppel is that the person making the statement is estopped to show that the will had been revoked. There is nothing in these statements

which estops the person making them from showing that the will which was then in existence subsequently was revoked. That being so, these statements did not work an estoppel in this case.

Since the argument we have received a paper headed, "Supplementary pages of brief of Kirby and Saunders." This paper does not comply with Rule 1 of the rules of the full court, and it is not signed by party or attorney or counsel. In this paper it is stated that "the claimants ask that the decree may be suspended; and that they be given leave to offer proof of the contents of the will executed by N. D. Silsbee in the Probate Court, such proof to be offered merely for the qualified or limited allowance of the will to show an exercise of the power of appointment." If this be treated as a motion it must be denied. It is not supported by an affidavit of facts. On the facts disclosed in the record there is no occasion for a suspension of the decree.

The trustee in bankruptcy of the life tenant has made the contention (as we understand it) that under the bankruptcy act of 1898 or the amendment U. S. St. 1910, c. 412, § 8, the trustee is vested with all powers which the bankrupt or a creditor had, and that the trustee now can appoint the portion of the trust fund to creditors by exercising the power of appointment given to the life tenant. But whatever may be the effect of these statutes, they do not enable a trustee in bankruptcy to make an appointment under a power which was to be exercised by the bankrupt by will and by will only, even when the bankrupt is alive, much less when he is dead. We have examined the cases cited by the trustees and find nothing in them which helps him in his contention.

It follows that the decree of the single justice must be affirmed; and in our opinion the appellees are entitled to recover one set of costs in this court from the appellants. It is

So ordered.

H. M. Davis, (F. Rackemann with him,) for the widow and children of Nathaniel D. Silsbee except his son George D. Silsbee.

C. H. Dow, for the defendant the William S. Osborne Company and the defendant Lemuel E. Demelman, trustee in bankruptcy.

C. Warren, C. Hunneman & R. S. Fenn, for the claimants John H. Kirby and Charles G. Saunders, submitted a brief.

**ALICE R. DRAKE vs. METROPOLITAN MANUFACTURING COMPANY.
SAMUEL J. DRAKE vs. SAME.**

Middlesex. December 9, 10, 1913. — May 25, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

*Agency, Ratification by principal, Scope of employment. Assault and Battery.
Sale, Conditional.*

Where, at the trial of an action against a corporation for an assault and battery alleged to have been committed by an agent of the defendant who on its behalf had delivered certain goods to the plaintiff upon a contract of conditional sale and who had committed the assault and battery in an effort to repossess the goods, the defendant contends and introduces evidence tending to show that the agent was not authorized to retake the goods on its behalf but that they had been charged to the agent under his contract with it and that he was attempting to get them on his own account, if there is evidence that when the agent retook the goods he delivered them to the defendant and that the defendant kept them, the jury may disbelieve the evidence offered by the defendant and are warranted in finding that the defendant ratified the acts of the agent.

Where, under a contract of conditional sale in which the vendee has agreed that the vendor "may cancel this contract any time prior to the acceptance of payment by an authorized collector of" the vendor, it appears that, upon payment of a small sum by the vendee to an agent of the vendor who had solicited the contract and who was called a "canvasser," the goods were delivered to the vendee but that the vendee had made no payment to an authorized collector of the vendor, the vendor has a right to retake the goods upon tendering to the vendee the small sum which he had paid, and is not required to give the notice required by R. L. c. 198, § 13, before possession of goods sold under a contract of conditional sale can be retaken by the vendee from the vendor, the provision of the contract above quoted not being an attempt to waive the statutory provision and being valid.

Where, at the trial of an action for an assault and battery committed upon the vendee of household goods, sold under a contract of conditional sale, by an alleged agent of the vendor in an effort to retake the goods, it appears that the goods were delivered to the vendee by the agent to whom the vendee paid a small sum, for which the agent receipted as a "canvasser," and that the vendee made no other payments under the contract, that the contract provided that the vendor might cancel it at any time "prior to the acceptance of payment by an authorized collector," made plain the distinction between a "canvasser" and a "collector," and cautioned the vendee to "pay no money to canvassers except first payment on delivery of goods," and there is no evidence that the agent who committed the assault was a "collector," the defendant is entitled to a ruling that under the terms of

the contract the defendant had a right to cancel it at any time before the acceptance of a payment by an authorized collector, and that there was no evidence upon which it could be found that the agent who received the payment made by the plaintiff was an authorized collector.

TWO ACTIONS OF TORT, the first for assault and battery alleged to have been committed upon the plaintiff by one William E. Durand, an agent of the defendant, and the second by the husband of the plaintiff in the first action for consequential damages. Writs dated respectively April 13, 1911, and September 21, 1912.

In the Superior Court the cases were tried together before *Hitchcock, J.* The material facts which the evidence tended to show are stated in the opinion. At the close of the evidence the defendant asked the judge to rule as follows:

"1. On the evidence the verdict should be for the defendant."

"9. Under the terms of the contract, signed by the plaintiff, the defendant had the right to cancel the contract any time prior to the acceptance of a payment by an authorized collector. There is no evidence upon which it may be found that Durand was an authorized collector, his duty being merely to sell goods.

"10. Under the contract or lease, the defendant had the right to retake the goods upon tendering the amount of the deposit which Mrs. Drake had paid, and was not required to give the notice provided for by R. L. c. 198, § 13, relative to notice, statement and demand."

The judge refused to make these rulings and submitted the cases to the jury. The jury found for the plaintiff in the first action in the sum of \$1,000, and for the plaintiff in the second action in the sum of \$50; and the defendant alleged exceptions.

A. E. Yont, for the defendant.

R. J. Lane, for the plaintiffs.

LORING J. The facts of this case were in substance as follows: One Durand, who was employed by the defendant as a canvasser, on July 6, 1910, delivered to the plaintiff in the first action (whom we shall hereafter speak of as the plaintiff) a set of lace curtains, valued at \$10.50, under a written lease, which contained the following provision: "I agree that said Metropolitan Mfg. Co. may cancel this contract any time prior to the acceptance

of payment by an authorized collector of said compapy, or before the delivery of the goods." This agreement was signed by the plaintiff. At the time that the curtains were delivered by Durand to the plaintiff he received from her eighty cents, and the following statement is printed and written on the lease then given her: "Date 7/6 Cts .80 Paid to Durand Canvasser Verified by Collector." Just below this occur the following words: "Pay no money unless duplicate agreement of this lease is presented by our collector. Caution: Pay no money to canvassers except first payment on delivery of goods." By the terms of the lease the plaintiff was to pay the defendant twenty-five cents a week.

There was evidence that on the third day of the following November Durand forcibly entered the plaintiff's house and retook the curtains. These actions were brought for the assault and battery then committed upon the plaintiff, the second action having been brought by the plaintiff's husband.

It is stated in the bill of exceptions that "the defendant does not contend that the jury were not justified in finding that an assault was committed by Durand, or that such assault was justified." The defendant's contention was that the plaintiff had failed to prove that Durand, in committing the assault, was acting in the course of his employment by the defendant, and for that reason that a verdict should have been directed for the defendant. And it further contended that the ninth and tenth rulings asked for by it should have been given.

The defendant introduced evidence that under the written contract by which Durand was employed, "Agents are held responsible for leased goods until the leases are verified and one payment has been made by the customer to the regular authorized collector and accepted by us. If the collector is unable to verify or recover the goods, they will be charged to the agent at 60% and deducted from any commissions, salary or security due him. If we cannot verify and accept a lease, the agent will be notified; if we cannot repossess the goods, the agent will pay for them." There was no evidence that any payment had been made by the plaintiff beyond the eighty cents paid Durand when the curtains were delivered. There was evidence introduced by the defendant that it had made two unsuccessful attempts to repossess itself of the curtains in question, one on July

21, and the other on August 31, and that on September 3, in accordance with its contract with Durand, it had charged the goods to him. Its contention was that, the goods having been charged back to Durand, he took them on his own account and not in the course of his employment when he committed the assault on the plaintiff in the following November. If the jury believed these facts, this result would have followed. But the jury were not bound to believe these facts. *Lindenbaum v. New York, New Haven, & Hartford Railroad*, 197 Mass. 314. There was evidence that the curtains were originally delivered to the plaintiff by the defendant. There was evidence that when they were retaken by Durand they were delivered by him to the defendant, and so far as appears on the evidence, that the defendant kept them. These facts warranted a finding that the defendant, if the jury did not believe the testimony put in by it, had taken the benefit of Durand's action in retaking the curtains, and therefore had ratified, if it did not originally authorize, him to take them as its agent. It follows that the first ruling asked for could not have been given.

But we are of opinion that the ninth and tenth rulings asked for should have been given. Undoubtedly an agreement by which the plaintiff undertook to waive the rights given her by R. L. c. 198, § 13, would have been void. *Desseau v. Holmes*, 187 Mass. 486. But the agreement contained in the lease set forth above was not an agreement by which the plaintiff waived her right under R. L. c. 198, § 13. It was an agreement by which the defendant had a right to cancel the contract before "the acceptance of payment by an authorized collector." Such an agreement, being an agreement giving a right to cancel the contract, is not a waiver by the plaintiff of her rights in case the defendant undertakes to retake the goods under the contract if not cancelled. For that reason the tenth request should have been given.

In the written lease Durand is described as a "canvasser" and the distinction between a canvasser and a collector is made plain in that agreement. The lessee is cautioned to "Pay no money to canvassers except first payment on delivery of goods." The only payment made by the plaintiff was the first payment on delivery of the goods, which was made to Durand, described in the written lease and agreement as a "canvasser," and there

was no evidence in the case that he was a collector. For these reasons the ninth ruling asked for should have been given also. The entry must be

Exceptions sustained.

GELLMAN POGROTZKY vs. MAX LEVATINSKY.

Suffolk. December 12, 1913. — May 25, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Equity Jurisdiction, To relieve from results of fraud. Fraud. Equity Pleading and Practice, Decree.

In a suit in equity to compel the redelivery of a mortgage note, which was signed by a person in Russia and was owned by the plaintiff and was alleged to have been procured from the plaintiff by the defendant through fraud, it appeared that the defendant had lent to the plaintiff \$500 for which the plaintiff had given him a note secured by a mortgage of real estate in Dedham, that, being in need of further funds, the plaintiff again had applied to the defendant for further advances, that the defendant, without making a definite promise, had encouraged the plaintiff to think that the advances would be made and in that connection had induced the plaintiff to deliver to him the Russian mortgage note. Later, because of the intervention of others, the defendant agreed to redeliver the Russian mortgage note and to make the further advances if the plaintiff would give him a new mortgage for \$900 and a release of all demands, that the plaintiff gave the new mortgage and the mortgage for \$500 was discharged, but that through fraud of the defendant the plaintiff was induced to sign and deliver to him an assignment of the Russian mortgage note and that the defendant then refused to make the promised advances or to return the Russian mortgage note to the plaintiff. While this suit was pending the \$900 mortgage was foreclosed by a sale without notice to the plaintiff. A master who heard the case found that the amount due on that "mortgage at the time of said foreclosure was \$675." A final decree was made directing the cancellation of the assignment of the Russian mortgage note and the redelivery of that note to the plaintiff. The defendant appealed, contending that, because of the quoted finding of the master, the redelivery should not be ordered without a payment by the plaintiff of \$675. *Held*, that the appeal was without merit, because the Russian mortgage note was not delivered to the defendant as security.

In the same suit, the final decree stated "that the mortgage and note for \$900 . . . was obtained from the plaintiff by fraud exercised by the defendant upon the plaintiff," but did not order any relief as to that note and mortgage. The plaintiff did not, and the defendant did appeal, and contended that so much of the decree should be stricken out. *Held*, that the decree should be modified by striking out the finding, because it was irrelevant to any relief given.

A final decree in a suit in equity should not contain findings of fact which are not relevant to relief given by the decree.

LORING, J. This case comes to this court on an appeal taken by the defendant from a final decree in favor of the plaintiff.* The many questions raised during the trial of the case have all been waived by the defendant except the question whether on the facts found by the master he is entitled to have the decree modified.

As we construe the master's report, the facts were in substance as follows: The plaintiff, a Russian who did not understand the English language and who at the time of the matters herein complained of had been in this country less than a year, was during that time living with the defendant, who was his brother in law. He had bought a lot of land, subject to a mortgage of \$2,400, and was engaged in the erection of a house upon it. Being short of funds he applied to the defendant for assistance. The defendant lent him \$500 on a second mortgage of the house. Later he applied to the defendant for further assistance to enable him to finish the house. The defendant, without making a definite agreement, encouraged the plaintiff to think that he would make a further loan, and in that connection requested the plaintiff to deliver to him a note held by the plaintiff for two thousand rubles (equal to \$1,000), which was secured by a mortgage on personal property situate in Russia. The defendant, having obtained possession of this note, refused to make any further advances. After the plaintiff had been to New York to seek the assistance of a relative of both the plaintiff and the defendant, and after some correspondence, the defendant promised to re-deliver the note to the plaintiff if the plaintiff would execute a release of all claims and demands which he had against him because of his previous detention of the note. The defendant also agreed that if the plaintiff would give him a \$900 second mortgage on the real estate in place of the \$500 mortgage then held by him, he would make further advances. Thereupon, the \$500 mortgage was discharged and a new mortgage for \$900 was executed by the plaintiff and was delivered to the defendant on May 15, 1911. At the same time the defendant presented to the plaintiff an assignment of the Russian note and mortgage, and induced

* The suit was referred to Michael J. Murray, Esquire, as master. Exceptions of the defendant to the master's report were heard and overruled by *Crosby, J.*, by whose order a final decree was entered as described in the opinion. The defendant appealed.

him to sign it by a false representation that it was a release of the demands which the plaintiff had against him by reason of his previous detention of the Russian mortgage note. Thereafter the defendant refused to make any further advances to the plaintiff, and this bill in equity was brought at a date which is not shown in the record. All that appears in that connection is that the substitute bill of complaint was filed on February 6, 1912. While this suit was pending, the plaintiff's real estate was sold for the unpaid taxes of 1911, and the defendant undertook to foreclose the \$900 mortgage without notice to the plaintiff. The property covered by that mortgage was sold at public auction. The master found "that the amount due on said mortgage at the time of said foreclosure was six hundred and seventy-five (675) dollars, which represents all moneys advanced thereunder by said defendant to said plaintiff."

On these facts a decree was entered declaring, first, that the Russian mortgage note and the assignment of the mortgage was obtained by the defendant through fraud practiced by him upon the plaintiff; second, that the alleged assignment of the Russian mortgage was null and void; third, ordering the defendant to deliver the Russian mortgage and note to the plaintiff forthwith and to execute, sign, seal and deliver to the plaintiff any and all papers necessary to effectually vest in the plaintiff title to them; and fourth, it was declared "that the mortgage and note for nine hundred (900) dollars set out in the plaintiff's bill of complaint was obtained from the plaintiff by fraud exercised by the defendant upon the plaintiff."

The defendant's contention is that the assignment to the plaintiff of the Russian mortgage and note and the making of the new mortgage for \$900 was one and the same transaction, and that inasmuch as the master has found "that the amount due on said mortgage at the time of said foreclosure was six hundred and seventy-five (675) dollars," the plaintiff is not entitled to have the Russian mortgage and note assigned to him without paying that sum of money to the defendant. This contention is wholly without merit. At the time that the defendant, by a fraudulent misrepresentation as to the contents of the assignment executed by the plaintiff, obtained by fraud this assignment of the Russian note and mortgage, the defendant agreed to make further ad-

vances to the plaintiff in consideration of the then second mortgage for \$500 being discharged and a new mortgage for \$900 being made to him. But under the findings of the master the agreement of the defendant to make further advances was an agreement to make further advances under the new second mortgage for \$900. Under the master's findings there was no agreement that the Russian mortgage should stand as security for the new advances.

The other objection to the decree is to the fourth clause, which declares that the mortgage and note for \$900 was obtained from the plaintiff by fraud. This objection is well taken. For the purpose of giving the plaintiff relief it was within the power and the duty of the judge to make this finding of fact if the evidence warranted it. But no relief founded on this finding was given to the plaintiff by this decree, and the plaintiff has not appealed from it. Under those circumstances the judge had no power to make the finding.

The result is that the decree must be modified by striking out the fourth clause. So modified it is

Affirmed with costs.

E. Greenhood, for the defendant.

No counsel appeared for the plaintiff.

LINUS W. HALL vs. BAY STATE STREET RAILWAY COMPANY.

Plymouth. January 15, 1914. — May 25, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Negligence, Street railway.

At the trial of an action against a street railway company by the driver of a swill cart to recover for personal injuries caused by the cart being run into from behind by a street car of the defendant, there was evidence tending to show that the plaintiff was passing another vehicle standing next to the curb in such a position that in passing it the plaintiff's left front wheel came upon the defendant's track, that, before turning to pass the other vehicle, the plaintiff looked over his shoulder and saw no car for a distance of seventy-five or eighty feet, and listened, that no warning whistle was blown nor gong nor bell sounded, and that the car, approaching at the rate of twenty miles an hour, struck the left front wheel of the plaintiff's cart and threw him to the ground. *Held*, that the question of the plaintiff's due care was for the jury.

TORT for personal injuries received by reason of a swill cart which the plaintiff was driving being run into from behind by a street car of the defendant. Writ dated January 10, 1911.

In the Superior Court the case was tried before *Hall, J.* The material facts which the evidence tended to show are stated in the opinion. The jury found for the plaintiff in the sum of \$900; and the defendant alleged exceptions.

Asa P. French, for the defendant.

J. J. Geogan, for the plaintiff, was not called upon.

LOURING, J. The only question in this case is whether the jury were authorized in finding that the plaintiff was in the exercise of due care.

The circumstances of this case were or could have been found to have been as follows: The plaintiff was driving a swill cart along a street in the city of Brockton in which there was a single track location of the defendant company. He was seated on the top of the swill box, with no canopy or covering to obstruct his view. As he drove along on the right hand side of the track, he came to a push cart standing next to the curb. He turned out to go by the push cart, and when "opposite the push cart" the car of the defendant, coming up from behind, struck the hub of the nigh forward wheel and threw him off the cart. The distance from the nearest rail of the car track to the curb of the sidewalk was fourteen feet "and some inches." The push cart was five feet wide, and the plaintiff's cart measured six feet and seven inches from hub to hub. If two feet be allowed for the overhang of the car, there was but six inches clearance between the push cart and the plaintiff's wagon and six inches more between the plaintiff's wagon and the defendant's car. That is to say, when the plaintiff pulled in toward the track to go around the push cart, for practical purposes he was driving in front of the car, and the rule laid down in *Sullivan v. Boston Elevated Railway*, 185 Mass. 602, where the plaintiff pulled in to go by one of the posts of the elevated structure, applies, namely: "So far as a car coming up behind him was concerned, Sullivan was bound to look and see that he had an opportunity to get upon the track. When on the track he had a right to drive by the post, and it was not his duty to turn off the track until he was by the post and became aware of the approach of the car from behind. See in this connection

Vincent v. Norton & Taunton Street Railway, 180 Mass. 104; *Le Blanc v. Lowell, Lawrence & Haverhill Street Railway*, 170 Mass. 564. See also *Robbins v. Springfield Street Railway*, 165 Mass. 30. It was for the jury to decide whether Sullivan turned in upon the track when the car was so near to him that a collision could not be avoided by the exercise of due care on the part of the defendant, or whether he had an opportunity to turn in, succeeded in turning in, and then was run down through the negligence of the defendant."

In the case at bar the jury were warranted in finding that the car came at the rate of twenty miles an hour, and that the plaintiff before he pulled in to go by the push cart looked over his shoulder for a distance of seventy-five or eighty feet and saw no car; also that he listened and no whistle was blown or gong sounded or bell rung.

We are of opinion that the jury were warranted in finding that the plaintiff was in the exercise of due care. For cases somewhat like the case at bar, see *Wood v. Boston Elevated Railway*, 188 Mass. 161; *James v. Interstate Consolidated Street Railway*, 193 Mass. 264; *Carroll v. Boston Elevated Railway*, 205 Mass. 429; *Donovan v. Connecticut Valley Street Railway*, 213 Mass. 99.

The entry must be

Exceptions overruled.

EMMA L. FRINK vs. BOSTON ELEVATED RAILWAY COMPANY.
WILLIAM A. FRINK vs. SAME.

Middlesex. January 15, 1914. — May 25, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Negligence, Street railway. *Evidence*, Presumptions and burden of proof. *Practice, Civil*, Conduct of trial: judge's charge.

In an action against a street railway company for personal injuries suffered by reason of the plaintiff being thrown to the ground by the starting of a street car of the defendant as she was boarding it at a regular stopping place, the declaration alleging that the servants of the defendant so negligently managed the car that it suddenly started without sufficient notice or warning to the plaintiff, there was evidence that the car was a closed one and was very crowded,

that as the plaintiff, following two companions, had one foot on the step of the rear platform and the other foot was on the street, two bells were sounded and the car immediately started, throwing her off her feet, that the conductor "was about two windows in the car" and "did not approach the rear platform." The judge, subject to exceptions by the defendant, instructed the jury that there was no evidence that the car was started because the conductor rang the bell, but that they might find that the conductor was negligent in allowing the car to be started by a third person ringing the bell; and read to them a portion of the opinion in *Nichols v. Lynn & Boston Railroad*, 168 Mass. 528, at page 530. The jury found for the plaintiff. *Held*, that the instruction was too favorable to the defendant, because the jury were warranted in drawing the inference that the car was started by the defendant's servants. *Held, also*, that, in order to hold the defendant liable on the ground that the conductor was negligent in allowing the car to be started by a third person, it was not necessary for the plaintiff to show that cars habitually had been started by third persons before the day of the accident, and that a verdict for the plaintiff was warranted; *and, also*, that it was proper for the judge to read the quotation from the former opinion, because it was applicable to the evidence.

TWO ACTIONS OF TORT, the first for personal injuries caused by the plaintiff being thrown to the ground by the starting of a street car of the defendant as she was in the act of entering it. The second action was by the husband of the plaintiff in the first for consequential damages. Writs dated June 20, 1911.

The allegations of negligence in the declaration were that, while the plaintiff was in the act of boarding the car, "the agents, employees or servants of said defendant so carelessly and negligently managed said electric that it suddenly started up without notice or warning, or sufficient notice or warning to the plaintiff, and threw her with great violence upon the ground and road, and dragged her quite a distance."

The cases were tried together before *Stevens, J.* There was evidence that the defendant's car was very crowded. Other material facts which the plaintiffs' evidence tended to show are stated in the opinion. At the close of the evidence, the judge, subject to exceptions by the defendant, refused to rule that upon all the evidence the plaintiffs were not entitled to recover.

The judge in his charge instructed the jury as follows: "The road in this case, on the evidence, is not to be held responsible because the conductor rang the bell and started the car, because there isn't any evidence that he did. It may have been rung by a passenger, and it may be that you will say that he was negligent in not having exercised such supervision that he would see

that no passenger should start the car by ringing the bell." The judge then read from the opinion of this court in *Nichols v. Lynn & Boston Railroad*, 168 Mass. 528 at page 530, as follows: "The plaintiff, it would seem, was in the exercise of due care, and no suggestion is made to us to the contrary: and the jury might have found that there was lack of due precautions, under the circumstances, to prevent the starting of the car through an unauthorized act of a passenger in ringing the bell. While the defendant was not bound to adopt all possible precautions to protect its passengers from injury in leaving its cars, it was bound to use the utmost care consistent with the nature and extent of its business to guard against all dangers which it could reasonably anticipate; and if the defendant failed in this duty, it is responsible for the consequences of its neglect. . . . It was competent for the jury, upon the evidence, to find that the defendant failed in its duty in allowing the car to be started up as it was, or in not taking greater precautions to prevent its being so started up, before the plaintiff had time to get safely off."

The jury found for the plaintiff in the first case in the sum of \$2,800, and for the plaintiff in the second case in the sum of \$300; and the defendant alleged exceptions.

P. F. Drew, for the defendant.

H. D. Moore & G. H. Russ, for the plaintiffs, were not called upon.

LORING, J. The facts in these two cases were, or could have been found by the jury to have been, substantially as follows:

The plaintiff, in the first case (who will be spoken of as the plaintiff), with two companions, undertook to board a car of the defendant. The plaintiff and her companions had signalled the car to stop and it had stopped. The plaintiff's two companions succeeded in getting upon the car. After they had done so, the plaintiff put one foot on the step and while the other foot was still on the street, two bells were sounded, the car started immediately and she was thrown off her feet. On the plaintiff's evidence the conductor "was about two windows in the car" and "did not approach the rear platform" while these occurrences took place.

Under these circumstances, the judge instructed the jury in effect that they could not find that the car was started by the defendant,

but that they could find that the conductor was negligent in allowing the car to be started by a third person, and he read a passage from the opinion in *Nichols v. Lynn & Boston Railroad*, 168 Mass. 528, 530.

To this charge the defendant took an exception.

In one respect the instructions given were more favorable to the defendant than those to which it was entitled. Under the facts of the case the jury were warranted in drawing the inference that the car was started by the defendant's servants. *Killam v. Wellesley & Boston Street Railway*, 214 Mass. 283.

But if the jury did not in fact draw that inference, that is to say, if they found (as they had a right to find) that the car was started by a third person, it was open to them to hold the defendant liable on the ground on which the defendant was held in *Nichols v. Lynn & Boston Railroad*, 168 Mass. 528, and which was not open under the pleadings in *O'Neil v. Lynn & Boston Railroad*, 180 Mass. 576, to wit, on the ground that the conductor was negligent in allowing the car to be started by a third person. As was said in *Nichols v. Lynn & Boston Railroad*, *ubi supra*: "The jury might think that the conductor was negligent in failing to hear, and at once to countermand, the signal to start, not to mention other possible aspects of the case." This ground of liability in such a case as the present was not denied by what was said in *Killam v. Wellesley & Boston Street Railway*, *ubi supra*, at page 285. To make out a case on this ground it is not necessary for the plaintiff to show that cars had been habitually started by third persons before the day of the accident, although that is competent, as was held in *Nichols v. Lynn & Boston Railroad*, *ubi supra*.

The portion of the opinion read to the jury from *Nichols v. Lynn & Boston Railroad*, *ubi supra*, applied to the case made out in the evidence in this action. It was not improper to read it to the jury. *Post v. Leland*, 184 Mass. 601. *Commonwealth v. Dow*, 217 Mass. 473.

Exceptions overruled.

JOHN B. VALENTE vs. FRANK COSENTINO.

Middlesex. January 16, 1914. — May 25, 1914.

Present: RUGG, C. J., LORING, SHELDON, & CROSBY, JJ.

Bankruptcy. Judgment. Merger.

It is no defense to an action of contract upon an account annexed that the plaintiff's claim previously had been allowed by a referee in bankruptcy in proceedings under the bankruptcy act of 1898 in which no dividend was paid on the bankrupt's estate and the bankrupt was refused a discharge.

CONTRACT upon an account annexed for \$527.85 and interest. Writ dated October 21, 1909.

In the Superior Court the case was heard without a jury by *Jenney, J.* It was agreed at the trial that at the date of the plaintiff's writ the defendant owed the plaintiff the amount claimed in the declaration; that the defendant previously had been adjudicated a bankrupt; that the plaintiff had proved this claim before the referee in bankruptcy, by whom it had been allowed; that no dividend was paid by the bankrupt's estate, and that the bankrupt was refused a discharge by the United States District Court.

The defendant asked the judge to rule that all the claims and demands sought to be recovered in this suit became merged in a judgment of the United States District Court by their proof and allowance against the estate in bankruptcy of the defendant, that there could be no recovery under the declaration in this action, and that upon the evidence the finding must be for the defendant under the pleadings. The rulings were refused. The judge found for the plaintiff in the sum of -\$642.42; and the defendant alleged exceptions.

The case was submitted on briefs.

J. P. Carney & H. W. Blake, for the defendant.

G. M. Palmer & E. V. Munroe, for the plaintiff.

LORING, J. The only defense to the plaintiff's demand was that the claim sued on had been proved in bankruptcy, and so was merged in a judgment.

There is no foundation for the contention. For a full explanation of the matter, see *Lowell on Bankruptcy*, § 219.

In our opinion the exceptions are frivolous and intended for delay.

The exceptions must be overruled with double costs from the time the exceptions were allowed; and the rate of interest from that time is to be twelve per cent a year. It is

So ordered.

MAURICE SECKENDORF vs. WACHTEL-PICKERT COMPANY.

Suffolk. January 16, 1914. — May 25, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Municipal Court of the City of Boston, Appellate Division: report. Practice, Civil. Contract, In writing.

In an action of contract in the Municipal Court of the City of Boston by a salesman against his employer for commissions on sales made in a certain territory by others than the plaintiff, it appeared that the defendant had written a letter to the plaintiff stating that he would pay the plaintiff, besides a salary, "1 % commission on all book accounts." The plaintiff's evidence tended to show that the quoted words included the sales on which he was claiming commissions. The defendant asked the trial judge to rule that the quoted words "do not, as a matter of law, mean one per cent commission on all book accounts which appear in the defendant's books regardless of the question by whom the sales were made or in what territory." The judge, in reporting the case to the Appellate Division after finding for the plaintiff, first stated his refusal of the ruling asked for, then stated as his construction of the defendant's letter "in connection with the other evidence in the case," that it entitled the plaintiff to a commission on "the entire output of the defendant's factory" and not merely on all sales made by the plaintiff, and then stated, "The defendant being aggrieved by my ruling as aforesaid has requested this report for determination by the Appellate Division." Held, that the judge intended to report the question of the correctness both of the ruling he gave and of his refusal to give the ruling asked for; and that, because it was apparent that he refused to construe the ambiguous words of the letter apart from evidence explaining their meaning and did construe them in the light of that evidence, his refusal to give the ruling asked for and the ruling he gave both were correct.

CONTRACT for commissions alleged to have become due to the plaintiff as a salesman for the defendant, as stated in the opinion. Writ in the Municipal Court of the City of Boston dated February 19, 1913.

The case was heard in the Municipal Court by *Wentworth, J.*, who found the facts and made the rulings described in the opinion. The judge found for the plaintiff in the sum of \$582.61, and at the request of the defendant reported the case to the Appellate Division, who dismissed the report. The defendant appealed.

P. Rubenstein, for the defendant.

S. A. Dearborn, for the plaintiff, was not called upon.

LORING, J. The plaintiff was employed by the defendant as a salesman in the city of New York for a period of fifty weeks from May 15, 1911, to April 26, 1912. For his services during that period he received a salary of \$30 per week. On the expiration of the period he claimed to be paid a commission of one per cent on the total sales of the defendant during the period of his employment made outside of New York as well as those made through him in New York. To this the defendant made two defenses: first, that the plaintiff had not performed his contract and so was not entitled to any commission, and secondly, that if he was entitled to any commission it was a commission on the sales made by him and did not include a commission upon other sales made by the defendant.

The plaintiff's right to a commission depended upon a letter dated April 12, 1911, written by Mr. Wachtel to the plaintiff. Mr. Wachtel represented the defendant, with full authority in making the arrangement made with the plaintiff. The letter was as follows: "After due consideration I have decided to give you a salary of \$30 per week and 1% commission on all book accounts." The judge found that the plaintiff had performed his contract, and in the light of the circumstances under which the letter was written ruled that it covered all sales of the defendant, whether made in New York or in outside territory.

The circumstances under which the letter of April 12, 1911, was written were put in evidence without objection. They consisted in the testimony of the plaintiff that some time in April, 1911, he had a talk with Mr. Wachtel in which he (the plaintiff) proposed that he should work for the defendant on a straight salary of \$60 a week, or \$35 a week and three per cent commission on his sales, or \$30 a week and one per cent commission on the entire output of the defendant's factory. This was denied by Wachtel. But the judge believed the plaintiff, and believing the plaintiff,

"in connection with the other evidence in the case," construed the letter of April 12, 1911, to entitle the plaintiff to a commission on "the entire output of the defendant's factory" and not merely on all sales made by the plaintiff.

The defendant requested the judge to give two rulings, the first of which only is now insisted upon. That ruling was as follows:

"(1) The words '1% commission on all book accounts' which appear in the letter of April 12, 1911, written by the defendant to the plaintiff, do not, as a matter of law, mean 1% commission on all book accounts which appear in the defendant's books regardless of the question by whom the sales were made or in what territory."

The rulings asked for were refused. After stating the rulings asked for and his refusal to give them, the judge states in his report the construction given by him to the letter of April 12, 1911, and ends his report in these words: "The defendant being aggrieved by my ruling as aforesaid has requested this report for determination by the Appellate Division of this court."

We interpret this to mean that the judge reports the question of the correctness of his refusal to give the rulings asked for and of the ruling which he made.

The defendant's contention now is that the first ruling asked for was a ruling as to the proper construction of the words "1% commission on all book accounts" apart from the circumstances under which the letter of April 12, 1911, was written, and that so construed the ruling ought to have been given. It is apparent that so construed the judge adopted the ruling. He states himself that the construction which he gave to those words in the letter of April 12, 1911, was given "in connection with the other evidence in the case." It is evident that the first ruling was construed by the judge to be a ruling as to the construction of the letter in view of the evidence in the case. So construed, it was rightly refused.

The oral offer which had been made by the defendant and which had been admitted in evidence without objection was a circumstance to be taken into consideration in construing the ambiguous words of the letter. See in this connection *Keller v. Webb*, 125 Mass. 88; *Proctor v. Hartigan*, 139 Mass. 554; *Aldrich v. Bay*

State Construction Co. 186 Mass. 489; *Streppone v. Lennon*, 143 N. Y. 626; *Gray v. Oylar*, 2 Bush, 256.

The entry must be

Order dismissing the report affirmed.

LILLIAN YOUNG vs. STEPHEN W. REYNOLDS.

Barnstable. January 26, 1914. — May 25, 1914.

Present: RUGG, C. J., LORING, SHELDON, DE COURCY, & CROSBY, JJ.

Equity Pleading and Practice, Decree, Appeal, Exceptions to rulings of judge, Costs. *Equity Jurisdiction*, To redeem from execution sale. *Execution. Interest.*

After a hearing of a suit in equity at which one of the parties saves exceptions to rulings of the judge, the judge has no power to enter a final decree until the exceptions are disposed of. If the judge attempts to enter such a decree, it will be treated in the consideration of the exceptions merely as an order for a decree, and an appeal therefrom will be dismissed.

Where the record accompanying a bill of exceptions in a suit in equity contains no copy of a replication, and the bill of exceptions does not state that the suit was heard on the bill and answer, and a memorandum for a final decree states that the suit was heard "upon bill and answer and was submitted on evidence and argument by counsel," the case will be treated by this court as one decided upon evidence introduced by the parties.

A ruling by the judge who heard a suit in equity to redeem from an execution sale certain "wild and uncultivated land, given over at the time of the purchase by the defendant to weeds, beach grass and bushes," that sums paid for "labor in cutting down silver leaf poplar bushes, and clearing [the] land of dead leaves and bushes from former cuttings" were "reasonable expenses incurred for repairs and improvements," which, among other sums, the provisions of R. L. c. 178, § 33, require that the plaintiff should tender to the defendant as a condition precedent to redemption, cannot be said to have been wrong as a matter of law, especially in the absence of a report of the evidence upon which it was made.

In a suit in equity under R. L. c. 178, § 33, to redeem certain land from an execution sale, the defendant is entitled to be credited, in the computation of the sum which the plaintiff must pay in order to redeem, with interest on sums paid by him for taxes while in possession of the land and reasonable expenses incurred for repairs and improvements.

In a suit in equity to redeem from an execution sale, the matter of costs is left under R. L. c. 178, § 41, to the discretion of the presiding judge except in the cases specified in that section; and therefore an exception by a plaintiff in such a suit to the awarding of costs to the defendant must be overruled where the evidence upon which the award was made is not before this court.

Where, in a suit in equity for the redemption of certain land from an execution sale, the defendant is awarded costs, it is proper to require that such costs be deposited with the clerk of the court for the use of the defendant.

A decree in a suit in equity awarding costs should state the amount of the costs. In a suit in equity for the redemption of land from an execution sale, where after a hearing the amount to be paid to the defendant for redemption under R. L. c. 178, § 33, is determined and costs are awarded to the defendant, a decree should order that, if such amount and costs are not paid by the plaintiff to the defendant within a certain time, a final decree stating that fact and dismissing the suit with costs shall be entered.

BILL IN EQUITY, inserted in a common law writ in the Superior Court, dated January 29, 1910, seeking to redeem certain real estate in Chatham from an execution sale.

The answer alleged, among other things, that the plaintiff never had sought for an ascertainment of the amount due to the defendant upon redemption, that the defendant never had refused an accounting, and that the plaintiff never had tendered a sufficient sum for redemption. The record contained no replication.

In the Superior Court the case was heard by *Dubuque, J.*, at the April sitting of the court at Barnstable. Material facts are stated in the opinion.

The sitting of the court was adjourned *sine die* on April 23, 1913. On April 25, the defendant presented a draft of a decree to the judge and to the plaintiff's counsel. On Monday, April 28, the clerk received the draft decree from the judge by mail with instructions to enter it as a final decree under the date of April 26. The plaintiff excepted to the entry of the decree on April 26, instead of April 28. These exceptions were filed on May 13, 1913.

The decree, which this court decides was entered improperly pending the determination of these exceptions, and which is treated as an order for a decree, was in substance as follows, so far as it is material to this decision:

"This cause came on to be heard at this term upon bill and answer and was submitted on evidence and argument by counsel, items 1, 3, 6, 7, 8 and 9 being agreed to both by the petitioner and by the respondent, and, thereupon, upon consideration thereof, it is ordered, adjudged and decreed

"That the petitioner pay to the clerk of this court on or before July 1, 1913, the sum of \$299.95, consisting of the several sums

paid out by the respondent on the several dates for the several purposes as follows, viz.:

1. Feb. 24, 1909,	Paid for property at sale on execution,	\$231.00
2. May 4, 1909,	Paid H. F. Gould, labor in cutting down silver leaf poplar bushes, and clearing land of dead leaves and bushes from former cuttings,	11.40
3. July 20, 1909,	Paid taxes and costs on land for year 1908,	10.46
4. Sept. 4, 1909,	Paid Solomon Atwood, labor in cutting down silver leaf poplar bushes and clearing land of dead leaves and bushes from former cuttings,	4.00
5. Sept. 4, 1909,	Paid H. F. Gould, labor in cutting down silver leaf poplar bushes, and clearing land of dead leaves and bushes from former cuttings,	2.00
6. Dec. 3, 1910,	Paid taxes and interest on land for year 1909,	10.01
7. Jan. 6, 1911,	Paid taxes on land for year 1910,	11.12
8. Jan. 4, 1912,	Paid taxes on land for year 1911,	10.53
9. Jan. 4, 1913,	Paid taxes on land for year 1912,	9.43
		<hr/>
		\$299.95

together with interest upon the aforesaid several sums from the aforesaid several dates upon which the aforesaid several sums were paid by the said respondent, until the date upon which the said petitioner shall pay to the said clerk the aforesaid principal sum of \$299.95 with interest as aforesaid, together with respondent's costs, to the use of the said respondent. . . .

"And that upon the failure by the said petitioner to pay such sum and such interest thereon, together with respondent's costs, within said time, then the bill to stand dismissed out of court."

The case was presented to this court upon exceptions alleged by the plaintiff to certain rulings of the judge. There was appended to the bill of exceptions a statement of an appeal by the plaintiff from the decree printed above.

W. O. Kyle, for the plaintiff.

H. A. Harding, for the defendant, submitted a brief.

LORING, J. This case comes before us on a bill of exceptions taken at a hearing on a bill in equity brought under R. L. c. 178, § 39, to redeem land from an execution sale.

1. Exceptions having been taken at the hearing, the judge had no power to enter a decree. *McCusker v. Geiger*, 195 Mass. 46. We treat the so called decree as an order for a decree. The appeal from the so called decree is not before us and must be dismissed. The questions raised by the exceptions will be considered.

2. The plaintiff asked the judge to rule as matter of law that sums paid for "labor in cutting down silver leaf poplar bushes, and clearing [the] land of dead leaves and bushes from former cuttings" were not "reasonable expenses incurred for repairs and improvements" within R. L. c. 178, § 33. The plaintiff in his brief has assumed that the case was heard on bill and answer. But there is no statement to that effect in the bill of exceptions; and the so called decree referred to in the bill of exceptions states that the cause was heard "upon bill and answer and was submitted on evidence and argument by counsel." We take the case as a case decided on evidence introduced by the parties. It is stated in the bill of exceptions that the land in question "was wild and uncultivated land, given over at the time of the purchase by the defendant to weeds, beach grass and bushes." We cannot say as matter of law, especially in the absence of the evidence on which the ruling was made, that such expenses are not "reasonable expenses incurred for repairs and improvements." It would seem pretty plain even in the absence of evidence that wild land would deteriorate unless silver leaf poplar bushes were cut down and dead leaves and bushes from former cuttings were taken away. See in this connection *Reed v. Reed*, 10 Pick. 398; *Merriam v. Goss*, 139 Mass. 77.

3. The next ruling asked for was that interest could not be allowed to the purchaser at the execution sale on taxes paid by him while he was in possession, or on the sums (just referred to) incurred in cutting down poplar bushes and clearing the land from dead leaves and bushes from former cuttings. The plaintiff's argument in this connection is that the right of redemption which he is pursuing is a statutory one, and that the statute (R. L. c. 178, § 33) which defines the sums to be paid in order

to redeem states that "interest" is to be paid on the amount for which the land was sold at the execution sale and does not state that interest is to be paid on "amounts paid for lawful taxes and assessments, [and] reasonable expenses incurred for repairs and improvements." The provision is that the debtor may redeem land taken or sold on execution "by paying or tendering to the creditor or purchaser, as the case may be, the amount for which they were so set off or sold with interest thereon from the time of the levy, all amounts paid for lawful taxes and assessments, reasonable expenses incurred for repairs and improvements and, in case of levy by set-off, all amounts lawfully paid on account of any mortgage or other lien recoverable under the provisions of section forty-eight, and deducting from such amount in each case the rents and profits received or which might have been received by the creditor or purchaser and with which he is lawfully chargeable." The first statute of which R. L. c. 178, § 33, is the re-enactment was Prov. St. 1712-13, c. 8. That act gave the debtor whose land had been taken on execution a right to redeem in one year "upon paying the full sum for which the same was taken, with interest from that time, and the reasonable necessary charges and disbursements laid out and expended thereon for repairing or bettering of the same, over and above what and so much as the rents, profits and improvements made thereof shall fall short of reimbursing such charges; to be accounted for by the party for whom the same was taken on execution, his heirs or assigns, agreeable to the provision made in the act for equity of redemption of estates upon mortgage forfeited for the condition broken." The act referred to was Prov. St. 1698, c. 22, § 4. That provided that the "mortgager" should have a right to redeem upon "tendering payment of the original debt and damages, or such part thereof as was remaining unpaid at the time of entry, with reasonable costs and allowance for any disbursements afterwards laid out on such housing or lands for the advancement and bettering of the same, over and above what the rents, profits or improvements thereof made shall amount unto, upon a just computation thereof by the court." Under that act we have no doubt that interest could be allowed on sums paid by the purchaser for taxes and expenses for repairing and better-

ing the estate. Moreover in St. 1783, c. 57, § 3 (re-enacting Prov. St. 1712-13, c. 8, § 1), it is expressly provided that interest on the rents, profits and improvements thereof is to be accounted for by the purchaser. If in making up the account of what is due interest is to be accounted for by the purchaser on the rents and profits received by him, he must be entitled to interest on sums paid out by him for which he is to have credit. In the Revised Statutes the provisions of the statute here in question were put into their present form (Rev. Sts. c. 73, § 24), and since then have been re-enacted without change. Gen. Sts. c. 103, § 26. Pub. Sts. c. 172, § 31. R. L. c. 178, § 33. The exception to this ruling must be overruled.

4. The next exception is to the refusal of the judge to rule that the defendant was not entitled to costs because he had not tendered an account before the beginning of this suit. By the true construction of R. L. c. 178, § 41, the matter of costs is left to the discretion of the court, except in the cases there specifically stated. This is made plain by the wording of the original act (Rev. Sts. c. 73, § 29), and by the note of the commissioners as to it. Rev. Sts. c. 73, § 29, provides that: "The court may, upon such bill for redemption, award costs to either party, as equity may require." In their note to Rev. Sts. c. 73, §§ 27, 28, 29, the commissioners say: "The creditor should never be required to pay costs, unless by his own unjust and unreasonable conduct he has compelled the debtor to resort to the law for redress; and the court, in the exercise of their discretionary power, would no doubt allow him his costs, in all cases when a suit was unnecessarily brought against him." This exception must be overruled.

5. The plaintiff's next exception is to the ruling that the costs to which the defendant is entitled must be deposited with the clerk for the use of the defendant. This provision follows the precedents in decrees for the redemption and foreclosure of mortgages. See 2 Dan. Ch. Pract. (5th Am. ed.) 997; Seton's Judgments & Orders, (7th ed.) 1825, 1832, 1852. The so called decree is not so favorable to the defendant as it ought to be. It should provide that if the amount specified was not deposited within the time specified the bill should be dismissed with costs.

6. The date of the so called decree, which in legal effect is an order for a decree, is of no consequence. If it can be construed

to have been the subject of a ruling by the judge, and if it is to be taken that an exception was taken to it, that exception must be overruled.

To avoid misapprehension we call attention to the fact that the amount of the costs to be paid to the defendant should be stated in the decree; *East Tennessee Land Co. v. Leeson*, 185 Mass. 4; and that if the sums to be paid by the plaintiff for the redemption of her estate are not deposited by her in accordance with the decree for redemption, a final decree stating that fact and dismissing the bill with costs should be entered. *Tetrault v. Labbe*, 155 Mass. 497, and cases cited.

Appeal dismissed. Exceptions overruled.

JOHN D. LONG & another, trustees, *vs.* SIMMONS FEMALE
COLLEGE.

Suffolk. March 10, 1914. — May 25, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Probate Court, Jurisdiction. Trust, Mortgage of trust estate. Mortgage. Constitutional Law.

Under St. 1872, c. 370, (now included in R. L. c. 147, § 18,) the Probate Court had jurisdiction not only to empower trustees under a will who owned real estate, the buildings on which were destroyed in the great Boston fire of 1872, to mortgage the property for the purpose of paying the expense of erecting new buildings upon the premises, but also to order that twenty-five per cent of the net rents of the mortgaged estate be reserved for the payment of the principal of the mortgage note, although provisions of the will under which the trustees held the real estate were that the income thereof should be paid to a certain person for her life in the discretion of the trustees, and that such income as was not paid to that person should be paid into another trust fund, and that, at the death of the beneficiary, the principal of the trust but none of the accumulated income should be added to a trust fund for the foundation of a college.

A decree of the Probate Court, granting a petition of trustees under St. 1872, c. 370, (now included in R. L. c. 147, § 18,) for leave to mortgage real estate for the purpose of paying the expense of replacing buildings destroyed by fire, the petition requesting also an order that twenty-five per cent of the net rents from the premises be reserved for the payment of the principal of the mortgage note, is valid, although notice of it was given only by publication, and there were persons living who were life beneficiaries of the trust estate and whose children also might become beneficiaries.

St. 1872, c. 370, (now included in R. L. c. 147, § 18,) providing that the Probate Court may authorize trustees holding real estate to mortgage it "for the purpose of paying the sums assessed thereon for betterments, or the expense of repairs and improvements thereon made necessary by such betterments, or by the lawful taking of such estate, or any part thereof, by any city or town, or for the purpose of paying the expense of erecting, altering, completing, repairing or improving any building on such estate, when it shall appear to the court to be for the interest of such estate;" and also "that the interest on such mortgage, and any portion of the principal which the court may order, shall be paid out of the income derived from the estate mortgaged as herein provided," is constitutional.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 14, 1913, and afterwards amended, by the trustees under the will and codicil of John Simmons late of Boston, against Simmons Female College, a Massachusetts corporation. The material allegations of the bill were in substance as follows:

The will of John Simmons was allowed in 1870. The fourth article of the will gave a "granite building" at the corner of Congress Street and Water Street, and a "granite-front store" on Franklin Street and Hawley Street, together with the land under and appurtenant to them, to trustees, the plaintiffs' predecessors, in trust to pay the income "or so much thereof as said Trustees shall see fit" to the testator's daughter Alvina White, "and so much of said remainder as shall not be paid, applied or used," the trustees were directed to hold subject to the provisions of article six of the will, which established a trust in certain property, the income of which was to be paid to the testator's granddaughter Anna White (afterwards Mrs. Henry S. Rowe) and her issue. On the death of Alvina the trustees were directed to add the property described in article four, exclusive of the accumulation of income, which was to be subject to the provisions of article six, to a fund established by article sixteen for the foundation of Simmons Female College. The trustees were given no power to mortgage real estate.

The buildings described in article four were destroyed in the great Boston fire in 1872. At a special session of the Legislature, St. 1872, c. 370, was enacted, repealing St. 1869, c. 451, and providing in § 1 that "Probate courts, having jurisdiction under the provisions of this act, after notice to all persons interested, and hearing thereon, may authorize any trustee or trustees appointed under any will, trust, deed or indenture, and having the control

or management of any real estate, to mortgage the same for the purpose of paying the sums assessed thereon for betterments, or the expense of repairs and improvements thereon made necessary by such betterments, or by the lawful taking of such estate, or any part thereof, by any city or town, or for the purpose of paying the expense of erecting, altering, completing, repairing or improving any building on such estate, when it shall appear to the court to be for the interest of such estate; and the interest on such mortgage, and any portion of the principal which the court may order, shall be paid out of the income derived from the estate mortgaged as herein provided."

Section 2 provided that "the petition shall set forth a description of the estate to be mortgaged, the amount necessary to be raised, and the purposes for which the same is to be used, and shall be made to the probate court for the county where the will under which such trustee or trustees were appointed was proved, in case the trust was created by will, or in the county where the trust estate, or any part thereof is located, in case such trust was created by deed or indenture; and the decree of the court thereon shall fix the amount for which the mortgage may be given, and the rate of interest which may be paid thereon."

A third section related to the form of the mortgage, and to the giving of a bond by the trustees.

The bill alleged that, under the foregoing statute, predecessors of the plaintiffs "on June 4, 1873, filed their first petition for leave to mortgage real estate for the purpose of erecting new buildings; and thereafter they filed numerous other petitions for the same purpose, and for the purpose of paying off existing mortgages; and in all these petitions the trustees prayed that the court fix the amount of principal to be paid out of income to be derived from the mortgaged estate. . . . The petitions did not set forth the peculiar provisions of the trusts established by the fourth and sixth articles of the will nor call attention in any way to the question as to how the payment of the principal of the mortgage out of income to be derived from the mortgaged estate would affect the rights of the several beneficiaries. No notice of the said petitions was given, except general notice by publication; no guardian *ad litem* was appointed to represent the interest of the minor or unborn children of Mrs. Rowe; and no persons other

than the trustees were actually represented in or made parties to the proceedings upon any of said petitions." The Probate Court, by decrees authorizing mortgages, "directed that twenty-five per cent of the net rents of the mortgaged estate be reserved for the payment of principal, subject to the further order of the court. The trustees accordingly did reserve twenty-five per cent of the net rents remaining after payment of mortgage interest, taxes, expenses of repairs and of management during the lifetime of Alvina White" for a number of years. Mrs. White died in 1886.

The defendant was incorporated in 1899, and the trustees shortly afterwards conveyed to it the fund which had accumulated in their hands. The real estate at the corner of Water Street and Congress Street had been mortgaged by them in 1874, under the decree of the Probate Court, for \$355,000. Payments, entered as from "cash" in their books, had been made from time to time, until, at the time of the conveyance to the defendant, the mortgage amounted to \$150,000. Upon the Franklin Street estate the original mortgage was \$110,000, while at the time of the transfer to the defendant it was \$97,550.53.

Further allegations of the bill were:

"These orders of the Probate Court were not intended to supersede or vary the provisions of the will, nor could they have such an effect. The payments upon principal do not correspond in amount with the amounts reserved under these orders of the Probate Court; all these reservations were directed to be made 'subject to the further order' of the court and no 'further orders' were made by the Probate Court; the payments of principal do not appear to have been made from income reserved by order of the Probate Court, and such payments should not be charged against income reserved from the trust established for the benefit of Mrs. White, because the will directs that such income, if not paid over to her, shall be added to the trust estate established by the sixth article for the benefit of Anna Rowe and her children.

"The trustees preceding the plaintiffs, by their books and accounts, have treated the amount of these reservations as if invested in the buildings; and by transferring these buildings to the Simmons Female College, together with the other estate, which the trustees had in their hands accumulating for the benefit of Simmons Female College, without allowance for these invest-

ments, the college has been unjustly enriched to the extent of the amounts so reserved from the net rentals and interest thereon; such accumulations should have been separately invested, and added to the trust under the sixth article of the will."

The defendant demurred to the bill for want of equity and on other grounds. The case was reserved by *Hammond, J.*, for determination by the full court.

J. B. Warner, for the defendant.

W. D. Turner, for the plaintiffs.

SHELDON, J. This case very probably might have been disposed of on the ground of the laches appearing on the face of the bill. But we prefer to deal with it on the merits.

The fundamental contention of the plaintiffs is that the part of the decree of the Probate Court which, after authorizing the giving of the mortgage by the trustees, directed them to reserve a stated portion of the income of the property as a fund for the payment of the principal of the debt, was invalid, and ought not to have been complied with at all by the trustees. If this contention fails, the bill cannot be maintained.

The decree was made on a petition filed by the trustees in 1873, after the destruction of the buildings by fire. The petition asked for leave to mortgage the real estate for the purpose of erecting a new building, and prayed that the court fix the amount of the principal to be paid out of the income of the mortgaged estate. Other similar petitions were filed by the trustees as to other estates, but we take the one first mentioned as a type of them all. The petitions are not before us, but the averments of the bill with regard to them are admitted by the demurrer. The petitions did not set forth the provisions of the fourth and sixth articles of the will, nor call attention in any way to the question as to how the provision for the payment of the principal of the mortgage out of the income would affect the rights of the several beneficiaries. No notice of the petitions was given except a general notice by publication. No guardian *ad litem* was appointed to represent the interests of the minor or unborn children of Mrs. Rowe. No persons other than the trustees were actually represented in or made parties to the proceedings.

We assume that the law in force in 1873, when the decree of the Probate Court was made, was as stated by Shaw, C. J., in

Peters v. Peters, 8 Cush. 529, 543 *et seq.*, — that is, that if the Probate Court, even though it had general jurisdiction over the subject matter, exceeded its powers or acted in a manner prohibited by law, its decrees were not merely irregular and voidable and so good until reversed in due course of law, but absolutely void and of no effect, and capable of being set aside in any collateral proceeding by plea and proof.

But this case does not come within that principle. The property held by the trustees included real estate. In the great Boston fire of 1872, the buildings thereon, like many others, were totally destroyed. It well may be that the land then could not have been sold, except at a sacrifice; it could yield no income unless new buildings should be erected; the money needed for this purpose could be obtained only by mortgaging the property. A building lease, so called, might be impracticable. As this trust (and many others) might be of long and undefined duration, and as buildings to be erected on the land might be subject to depreciation, and as it could not be expected that there would be any individual responsibility upon an indebtedness to be secured by a mortgage, the Legislature in enacting St. 1872, c. 370, and the Probate Court in passing decrees thereunder, might see plainly that the requisite amount could not be borrowed upon a mortgage, without some arrangement for its gradual reduction out of net income, instead of leaving it to be a final charge upon the corpus of the estate at some future time. It certainly was for the interest of life tenants, no less than of those in remainder, that the property should be put in condition to yield some net income rather than to be a charge upon the estate for its taxes. It was to meet such a state of affairs that the statute was passed. It provides a remedy which ordinarily will be for the advantage of all persons interested.

The petition filed in the Probate Court by the trustees in 1873 was like a proceeding *in rem* for the conservation of the estate as a whole for the benefit of all persons interested. Not only did the court have jurisdiction of the subject matter of the petition, but it had power to act and to make a decree, although no personal service of notice had been made upon those who were interested in the estate and although no guardian *ad litem* had been appointed to represent persons who were unborn or were under any disability. The trustees themselves represented all parties in interest. The

notice given generally by publication was sufficient. This was so held after careful consideration in *Warren v. Pazolt*, 203 Mass. 328, 345. Such notice was given; and not even this part of the decree of the Probate Court now is open to attack.

It is not necessary to discuss the other questions which have been argued. The validity of the decree having been established, nothing is left but questions of accounting, as to which the jurisdiction of the Probate Court was and is exclusive.

We see no reason to doubt the constitutionality of St. 1872, c. 370, now included in R. L. c. 147, § 18. It comes within the reasoning of *Sohier v. Trinity Church*, 109 Mass. 1, 17, and *Old South Society v. Crocker*, 119 Mass. 1, 26.

As it is manifest that the bill cannot be maintained, the entry must be

Demurrer sustained and bill dismissed with costs.

WILLIAM T. SULLIVAN'S CASE.

Suffolk. March 16, 1914. — May 25, 1914.

Present: RUGG, C. J., LORING, SHELDON, & CROSBY, JJ.

Workmen's Compensation Act. Words, "Incapacity for work."

Under St. 1911, c. 751, Part II, § 9, providing for the payment to an injured employee of a weekly compensation "while the incapacity for work resulting from the injury is total," the Industrial Accident Board have a right to find that an employee, who sustained an injury requiring the amputation of his right arm, was totally incapacitated for work until the day when he first was able to obtain work that a one-armed man could do, although he was capable of doing such work about five months before he succeeded in procuring it.

SHELDON, J. This employee sustained an injury which necessitated the amputation of his right arm, and for which it is admitted that he was entitled to compensation. But the insurer contends that on May 31 following the accident he was physically able to go to work, and that for this reason his right to be compensated for an incapacity for work ceased on that day, regardless of the question whether he was or was not able to procure work. The facts found by the committee of arbitration and, on

review, by the Industrial Accident Board are, that from May 31 to October 25 he did not work, that he diligently endeavored to secure employment and was unable to obtain work because of the loss of his arm, but that on May 31 he was capable of doing the work which he finally procured, or any work which a one-armed man could ordinarily perform. Upon these facts and as an inference therefrom it further was found that he was in fact unable to obtain any work at which he could earn wages during the period from May 31 to October 25, and he was awarded compensation for a total incapacity for work during that time.

Our statute provides for a weekly compensation while "the incapacity for work resulting from the injury is total." St. 1911, c. 751, Part II, § 9. The expression "incapacity for work" was taken from the English workmen's compensation act of 1906 in which it was provided that the amount of compensation to be paid, "where total or partial incapacity for work" resulted from the injury, should be certain weekly payments. Accordingly decisions of the English courts fixing the meaning there to be given to these words are of weight. *McNicol's Case*, 215 Mass. 497, 499, 501.

The same words were used in an earlier English statute; and it was held by the Court of Appeal in *Clark v. Gas Light & Coke Co.* 21 T. L. R. 184, that the object of the act was to give compensation for an inability to earn wages, and that, if an injured employee after repeated efforts could not get an opportunity to earn wages, a finding that his earning power was gone and therefore that he was under an "incapacity for work" was warranted, although he had a physical capacity to work and earn money. The same principle has been affirmed in other English decisions, that an inability to obtain work resulting directly from a personal injury is an incapacity for work within the meaning of this act, although a like inability resulting from some other cause, such as an altered condition of the labor market, would not be so. The inability to get work is evidence tending to show an incapacity for work, although it will not always be conclusive. *Radcliffe v. Pacific Steam Navigation Co.* [1910] 1 K. B. 685. *Cardiff & Co. v. Hall*, 4 B. W. C. C. 159, and [1911] 1 K. B. 1009. *Brown v. J. I. Thornycroft & Co.* 5 B. W. C. C. 386.

This doctrine of the English courts was settled finally in two

decisions of the House of Lords. *Ball v. William Hunt & Sons*, 5 B. W. C. C. 459, overruling *S. C.* in the Court of Appeal, [1911] 1 K. B. 1048; and *McDonald v. Wilson's & Clyde Coal Co.* 5 B. W. C. C. 478.

In our opinion these decisions are correct in principle. The object of our statute was to give compensation for a total or partial loss of the capacity to earn wages. *Gillen's Case*, 215 Mass. 96, 99. If, as in this case, the injured employee by reason of his injury is unable in spite of diligent efforts to obtain employment, it would be an abuse of language to say that he was still able to earn money, that he still had a capacity for work, even though his physical powers might be such as to enable him to do some kinds of work if practically the labor market were not thus closed to him. He has become unable to earn anything; he has lost his capacity to work for wages and to support himself, not by reason of any change in market conditions, but because of a defect which is personal to himself and which is the direct result of the injury that he has sustained. He is deprived of the benefit which the statute promises to him if he is told that because he could do some work if he could get it, he is not under an incapacity for work, although by reason of his injury he can obtain no opportunity to work. But we said in *Donovan's Case*, 217 Mass. 76, that the statute was to be construed broadly for the purpose of carrying out its manifest purpose.

The Industrial Accident Board had a right to find that this employee was totally incapacitated for work until October 25, and to award him compensation upon that basis. The decree of the Superior Court must be

Affirmed.

E. C. Stone, for the insurer.

J. H. Mulcare, for the employee.

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MATTHEW C. CORSICK vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. March 16, 17, 1914. — May 25, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Practice, Civil, Exceptions, Conduct of trial: judge's charge. *Evidence*, Contradicting one's own witness. *Witness*, Contradiction.

In an action of tort for personal injuries, the bill of exceptions occupied one hundred and ninety-four pages of the printed record, of which one hundred and thirty pages contained testimony set forth in the form of questions and answers and *it was said* by SHELDON, J., that the exceptions ought not to have been presented by counsel nor allowed by the judge in that form.

In an action against a street railway company by a motorman for personal injuries received while in its employ in a collision between a street car which the plaintiff was operating and another street car in front of it, the declaration and specifications filed by the plaintiff stated as the negligence of the defendant on which the plaintiff relied, "that the defendant furnished him with an electric car equipped with appliances for controlling and stopping said car which were unsafe, defective and out of repair, rendering it impossible properly to control and to stop said car," and the case was tried on the understanding that the only portion of the car which the plaintiff contended was defective was the braking appliance. The judge charged the jury, subject to exceptions of the defendant, that, if the plaintiff was running the car in the proper way in every respect, and if he undertook to put on the air brake under conditions such as would naturally, if the brake had been in proper order, have made the brake work, and if, all other conditions being what they should have been, the car failed to respond to the brake as it naturally should have responded, then there was some evidence of a defect in the car. *Held*, that the exceptions must be sustained, because the instructions permitted the jury to find that the car was defective in some part other than the braking appliance and to find that such defect prevented the brake from working and was the cause of the plaintiff's injuries.

Where a conductor of a street railway company, called to testify for the plaintiff in an action for personal injuries, is asked whether he had made any report about a certain car, or whether he had reported that "the car was no good," and answers that he does not remember, the plaintiff cannot introduce in evidence under R. L. c. 175, § 24, for the purpose of contradicting him, evidence tending to show that he had made such a report, or that on a previous occasion he had stated that he had made such a report, such evidence not tending to show that his statement of his lack of memory on the subject was false.

TORT for personal injuries, received while the plaintiff was in the employ of the defendant as a motorman and caused by a

collision of a street car which the plaintiff was operating with a car which was standing in the Atlantic Avenue station of the East Boston tunnel. Writ dated July 15, 1907.

In the Superior Court the case was tried before *Dana, J.* Material facts relating to the pleadings, the evidence and the instructions to the jury are stated in the opinion.

The witness Gerring, mentioned in the opinion, it appeared, had been a conductor in the defendant's employ in charge of the car on which the plaintiff was injured on its trip immediately preceding the trip upon which the collision occurred. The questions to Gerring as to his previous statement and the testimony of Williams, mentioned in the opinion, on the same subject, were admitted in evidence subject to the defendant's exceptions.

The jury found for the plaintiff in the sum of \$5,000, which under an order of the judge afterwards was reduced to \$4,000. The defendant alleged exceptions.

The bill of exceptions occupied one hundred and ninety-four pages of the printed record, of which one hundred and seventy-two pages contained a statement of the evidence, at least one hundred and thirty pages being in the form of questions and answers.

W. G. Thompson, (G. E. Mears with him,) for the defendant.

W. I. Badger, (W. H. Hitchcock with him,) for the plaintiff.

SHELDON, J. These exceptions ought not to have been presented by counsel nor allowed by a judge in the form in which they come before us. *Romana v. Boston Elevated Railway, ante, 76.*

We do not attempt to make any statement of the case. The judge rightly ruled that the issues were for the jury. It could be found that the accident was caused by a defect in the brakes of the car or the apparatus connected therewith, and not by any negligence of the plaintiff, or by any unjustifiable violation on his part of the rules put in evidence by the defendant. It could be found also that this defect was due to the negligence of the defendant. The jury had a right to return a verdict against the defendant. Whether this was in accordance with the weight of the evidence is not for us to consider. The general instructions given were sufficiently favorable to the defendant.

But the judge instructed the jury that if the plaintiff was run-

ning the car in the proper way in every respect, and if he undertook to put on the air brake under conditions such as would naturally, if the brake had been in proper order, have made the brake work, and if, all other conditions being what they should have been, the car failed to respond to the brake as it naturally should have responded, then there was some evidence of a defect in the car.

The plaintiff had filed specifications of his claims, and had specified as the negligence of the defendant on which he relied under each of his counts "that the defendant had furnished him with an electric car equipped with appliances for controlling and stopping said car which were unsafe, defective and out of repair, rendering it impossible properly to control and to stop said car." His further specifications, that he intended to rely on the negligence of the defendant's superintendent, the person acting as superintendent and the starter, added nothing to the statement of the kind of negligence relied on. At the close of the evidence, his counsel said to the judge, "We stake our case upon the plaintiff being furnished with a defective car which was out of order and they knew was out of order, and improper to run." Then the judge said, "The portion of the car that is alleged to be defective is not any part except the brake as I understand it, that would include fairly the brake shoes, the appliances for stopping the car, — include the hand brake and the air brake and the shoes and anything connected with the instrumentality used to stop the car." To this the plaintiff's counsel assented, saying, "I drew it [the specification] broadly so it would cover everything in that line." And throughout the trial the plaintiff relied upon a stated defect in the brakes, that the brake shoes at one end of the car had become so worn away that they were incapable of exercising proper control over the car or of stopping it with sufficient promptness. But under the instruction given the jury were permitted to find that if this were not so, yet if the plaintiff was managing the car properly and if the rails were in proper condition there was a defect in the car because it failed to respond to the brakes as it naturally would have done. And in substance this was repeated later to the jury.

We cannot say that upon the evidence the jury may not have found that the specific defect which we have stated was not proved to have existed or to have caused the accident. In that event

their verdict may have been rested upon a finding that the car failed to respond properly to the brakes, that this indicated some defect in the car outside of the brakes, which, though unascertained by the evidence, the defendant ought to have discovered and remedied, and that the other requisites stated by the judge were proved. If this is so, there has been a mistrial; and the defendant's exceptions must be sustained.

We find only one point that requires discussion in the exceptions relating to evidence. This relates to the examination by the plaintiff of his witness Gerring, and the testimony of Williams upon the same subject. The plaintiff had a right to prove that Gerring had at another time made statements that were inconsistent with his testimony given at the trial, by which the plaintiff claimed to have been surprised, if he first mentioned to the witness the circumstances of such inconsistent statements and asked the witness if he had made them, and if so, allowed the witness to explain them. R. L. c. 175, § 24. But the statements about which Gerring was asked were not inconsistent with his testimony. He had testified that he did not remember whether he had made any report about the car, or whether he had reported that "the car was no good." Evidence of his statements that he had made such a report was not inconsistent with his alleged failure of memory. That is settled by our decisions. *Commonwealth v. Welsh*, 4 Gray, 535. *Cumberland Glass Manuf. Co. v. Atteaux*, 199 Mass. 426, 432, 433. There is nothing inconsistent with this in *Foster v. Worthing*, 146 Mass. 607, or *Liddle v. Old Lowell National Bank*, 158 Mass. 15. For the same reason the testimony of Williams that Gerring upon a previous occasion had stated that he had made such a report was incompetent. All this testimony was highly prejudicial to the defendant, and the defendant's exceptions to its admission must be sustained.

We find no other error at the trial than what we have stated.

Exceptions sustained.

JAMES A. HUTCHINSON v. THOMAS G. PLANT.

Essex. March 18, 1914. — May 25, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Agency, Commission. Contract, Performance and breach. Practice, Civil, Statements of counsel, Conduct of trial. Evidence, Competency, Admissions and confessions, Production of papers.

In an action to recover a commission for having procured an agreement of two persons to pay the defendant \$1,500,000 for a half interest in his shoe machinery business and to provide him with at least \$1,000,000 of working capital for carrying on that business, if it appears that by reason of the services of the plaintiff the two persons in question at an interview with the defendant agreed to the terms of the agreement as set forth in a memorandum drawn by the plaintiff and approved by the defendant, but that, after the conclusion of that agreement, the defendant made new requirements to which the two persons contracting with him would not accede, and that the agreement which had been reached was abandoned and the whole matter dropped, the plaintiff is entitled to go to the jury on counts for a *quantum meruit* and on an account annexed.

Where at the trial of a civil case the plaintiff's counsel in his opening statement to the jury refers to an alleged admission made by the defendant, and, this statement being wholly unsupported by any evidence, the judge instructs the jury that it is to be disregarded, the defendant is not entitled as a matter of right to introduce evidence to contradict the counsel's unsupported statement, and the presiding judge in his discretion properly may refuse to permit him to do so.

At the trial of an action of contract the defendant was called as a witness by the plaintiff and the plaintiff's counsel asked the defendant whether he had dictated to any one a statement of what took place at a certain interview, and the defendant answered that he had so dictated to his attorney. The plaintiff's counsel then, appearing to read from a paper a statement purporting to be what was said by the defendant at the interview in question, asked the defendant whether he made that statement. The defendant answered, "Something on that order. I will not say you have not quoted it accurately. I will not say that I did not make that statement in exactly the words you have read." The evidence was competent and material and was not objected to. Neither the defendant nor his counsel then asked to see the paper. Afterwards, the defendant's counsel, before calling the defendant as a witness in his own behalf, asked for the paper, and the plaintiff's counsel refused to produce it. The presiding judge refused to order the production of the paper and excluded evidence offered by the defendant regarding the paper and its contents. *Held*, that the evidence put in by the plaintiff was not secondary evidence of the contents of the paper but primary evidence of an oral admission of the defendant, and that the defendant, even if he had had the right to see the paper from which the plaintiff's counsel was reading before he could be required to answer questions that really or apparently were asked about its contents, had waived such right by answering without objection, and that his call for the production of the paper came too late.

CONTRACT for compensation for having procured the making of a certain agreement between certain persons and the defendant, the first and fourth counts of the declaration, which alone are material, being described in the opinion. Writ dated January 17, 1911.

In the Superior Court the case was tried before *Chase, J.* The material facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to rule that the plaintiff could not recover on the first, on the fourth or on any count of the declaration, and also asked for the following rulings:

"9. In determining whether Evans, Wallace and Plant came to an agreement at their joint conference, the conference should be treated as a whole.

"10. The evidence does not warrant a finding that Wallace and Plant ever came to an agreement for a loan.

"11. If Evans and Wallace would not invest the money until they satisfied themselves that the proposition was a safe one, then they were not men able, ready and willing to furnish the money before they had so satisfied themselves, and if they did not so satisfy themselves, the plaintiff cannot recover on the first, second, third or fourth count of the declaration.

"12. If the proposition, if any, of Evans and Wallace was dependent on an investigation, then they were not men ready, able and willing to furnish money before such investigation was made, and if so, the plaintiff cannot recover on the first . . . or fourth count of the declaration."

"14. The evidence does not warrant a finding that Wallace and Evans themselves were financially able and ready to furnish about \$1,500,000 before October 1, 1910, and sufficient money thereafter for working capital estimated at about \$1,000,000 for this shoe machinery business.

"15. The evidence does not warrant a finding that Wallace and Evans were ready, able and willing to agree themselves to furnish about \$1,500,000 before October 1, 1910, and sufficient money thereafter for working capital estimated at about \$1,000,000 for this shoe machinery business.

"16. If Wallace and Evans did not agree to furnish the entire money themselves, but were merely to agree on the terms

on which they intended to form a syndicate, to be made up of themselves and such others as could be found to agree to furnish the money, and this syndicate was ever formed, then this did not constitute finding men ready, able and willing to furnish the money, in such a sense as would of itself entitle the plaintiff to compensation."

"20. The evidence does not warrant the conclusion that Plant did not intend in good faith to avail himself of such loan as might be obtained through Hutchinson."

"22. The evidence does not warrant the conclusion that Wallace or Evans ever actually formed the syndicate.

"23. If Plant and Hutchinson made a definite agreement that Plant would pay Hutchinson \$50,000 in cash if the trade went through and double that amount if the business was sold before January 1, 1911, and no other agreement as to compensation was made either expressly or by implication, then the plaintiff cannot recover on the first . . . or fourth counts of the declaration."

The judge refused to make these rulings except so far as some of them were covered by his charge, and submitted the case to the jury upon the first and fourth counts of the declaration with other instructions, which in part are described in the opinion.

The jury returned a verdict for the plaintiff in the sum of \$109,168; and the defendant alleged exceptions to the refusal of the rulings requested and to certain rulings as to the admission and exclusion of evidence which are referred to in the opinion.

E. F. McClennen, (*W. H. Niles* with him,) for the defendant.

H. F. Hurlburt, (*G. Calkins & C. A. Wilson* with him,) for the plaintiff.

SHELDON, J. The plaintiff seeks to recover a commission for having procured for the defendant from certain persons an agreement to pay to the defendant the sum of \$1,500,000 for a half interest in his shoe machinery business and to provide him with additional working capital, estimated at \$1,000,000 at least, for carrying on that business. The verdict for the plaintiff was rendered upon the first and fourth counts of his declaration, which were respectively upon a *quantum meruit* for the value of his services and an account annexed, in which he claimed to be entitled to \$150,000 for the same services. There was evidence which warranted a finding that the plaintiff had been employed

by the defendant to render these services, and that the plaintiff thereupon brought the defendant into communication with two men in New York, Wallace and Evans, with whom there was considerable negotiation by both the plaintiff and the defendant. Finally, on September 8, 1910, the defendant and Wallace and Evans had a meeting at the rooms of the Central Trust Company in New York, to discuss the matter. The plaintiff contends that in this interview a definite agreement was made between them, that the defendant stated the terms upon which he would take the money from Wallace and Evans and their associates (called the Central Trust Company Associates) and that Wallace and Evans agreed to furnish the money on those terms. The defendant however contends that there took place at this interview nothing more than merely tentative negotiations, conducted with a view to ascertain whether there was any basis upon which an agreement afterwards could be reached. The plaintiff testified that two days before this interview the outlines of the proposed plan had been approved by the defendant, and that he, the plaintiff, had prepared a memorandum which read as follows: "Wonder Worker Shoe Machinery Company, formed with four million dollars preferred and six million dollars common, Mr. Plant owning all the stock. Mr. Plant sells \$2,000,000 Preferred and \$3,000,000 Common to Central Trust Company Associates for \$1,600,000. This being one half, more or less, of Mr. Plant's investment in the shoe machinery business. The Central Trust Company Associates make this purchase only after being satisfied with investigation. The Wonder Worker Company to own everything Mr. Plant owns or controls in the shoe machinery business including all patent rights. Common stock only to have voting power; no dividends to be paid on preferred stock the first year. Mr. Plant to be president of the company, and of the six directors to have three selected by and including himself." The plaintiff testified that this memorandum was approved by the defendant. There was much contradictory evidence, but the jury could find that at the meeting of September 8 a definite agreement was made between the defendant and Wallace and Evans, upon the basis of this memorandum and the additional stipulation that they, Wallace and Evans, should supply also working capital to the amount of \$1,000,000. There was evidence also that after

the conclusion of this agreement the defendant made additional demands upon Wallace and Evans, and that for this reason the matter fell through.

Upon these findings the verdict for the plaintiff was justified, and these exceptions must be overruled, unless some of the specific contentions now made by the defendant shall be sustained.

1. It is true, as the defendant contends, that at the end of the interview of September 8 there was no binding agreement between the defendant and Wallace and Evans. But this is not decisive; for as we have seen it could be found that a final and definite agreement had been made in the course of that interview, by the defendant's statement of his terms and the acceptance of those terms by Wallace and Evans to the defendant's satisfaction. If then, after the conclusion of that agreement, the defendant made new requirements to which Wallace and Evans would not accede, and thereupon the agreement which had been reached was abandoned and the whole matter dropped, this would not affect the right which already, upon the conclusion of the agreement, had accrued to the plaintiff. *Fitzpatrick v. Gilson*, 176 Mass. 477, 478, 479. *Roche v. Smith*, 176 Mass. 595. *Johnson v. Holland*, 211 Mass. 363. The defendant's tenth request rightly was refused, and the question fairly was left to the jury under full and accurate instructions.

2. The defendant's ninth request ought not to have been given in the form in which it was put, for the reason that has been stated. But the jury were told that everything that took place during the interview or conference, as well as what took place before and afterwards, bearing upon the issue, must be considered. That was correct, and it was enough.

3. The fifteenth request rightly was refused. If the defendant had given his terms to Wallace and Evans and they had accepted those terms and made a definite agreement with him to his satisfaction, as under the instructions given the jury must have found, that was enough. Having accepted the terms, as stated by the plaintiff in his behalf, adopted by himself, and acceded to by Wallace and Evans, it was no longer a question whether Wallace and Evans could themselves out of their merely individual resources furnish the necessary money, if in fact they could obtain it. If the defendant was satisfied with their responsibility

and was willing to accept and in fact did accept them as sufficiently responsible for the purpose, — if in other words he chose to accept Wallace and Evans and their assent to his proposition as a performance by the plaintiff of what he had employed the plaintiff to perform, — the final agreement so made by him with Wallace and Evans was enough. *Ward v. Cobb*, 148 Mass. 518. *Monk v. Parker*, 180 Mass. 246. *Cohen v. Ames*, 205 Mass. 186. *Johnson v. Holland*, 211 Mass. 363. *Rosenthal v. Schwartz*, 214 Mass. 371. Upon this point also the instructions given were sufficiently favorable to the defendant.

4. The subject matter of the sixteenth and twenty-second requests was dealt with correctly. And this matter now has become immaterial; for we must take it as settled that the defendant did on September 8 conclude a definite agreement with Wallace and Evans. And under the instructions the jury must have found also that Wallace and Evans were able, ready and willing to furnish the necessary money, and that the defendant was satisfied of this fact.

5. The eleventh and twelfth requests were mainly covered by the charge. So far as not given, they were dealt with rightly. The language of the memorandum that the associates "make this purchase only after being satisfied with investigation" was ambiguous, and the agreement was an oral one, though founded upon this memorandum. The judge left it to the jury to say whether the investigation was to be into the merits of the plaintiff's claims and the safety of the proposed investment, in which case he ruled that the plaintiff could not recover, or whether it was to be merely an investigation into the truth of the defendant's representations of existing facts. Summing this up, the judge said to the jury: "If Wallace and Evans at that time had before them a definite proposition made by the defendant, and they said, in effect, 'We will accept your proposition subject to verification,' you might find that that constituted such an agreement as is required in this case, and that that was an acceptance of the defendant's proposition. If, on the other hand, what they said was in effect, 'We are interested in your proposition. We will look into it and investigate it in order to determine whether or not we think it wise or safe, and will let you know later,' then there was no such agreement as is necessary to be shown by the plaintiff in order

to entitle him to a commission. You see this all may be placed in another light. The plaintiff must show that these men were willing to consummate the transaction at that time upon the terms which they claim were advanced by the defendant or named by him. They would be so willing if they agreed to do it subject to verification of the facts as stated by Mr. Plant. They would not be willing, within the meaning of that word, to do it if they said, 'We want to investigate facts and decide afterwards.' The difference is between whether they said, or whether you find that they said, 'We will decide now subject to verification of your statements,' or whether they said, and their position was in fact, 'We will investigate first and decide later.'"

This was full and correct; and the jury had a right to find that the stipulation for investigation did not constitute a condition precedent to the existence of an agreement, but a reservation to be complied with before the agreement should be carried out, which easily could be complied with before the time when the money was to be furnished. Of course, if representations of fact made by the defendant were false and were found so to be, and for that reason Wallace and Evans had been relieved of their obligations, this failure of the agreement, arising from the defendant's own fault, would not have released him from liability to the plaintiff. *Wright v. Young*, 176 Mass. 100. *Dotson v. Milliken*, 209 U. S. 237. *Little v. Liggett*, 86 Kans. 747.

6. The fourteenth request rightly was refused. The very fact that the defendant, without any evidence of fraud or mistake, had, as must have been found, accepted the responsibility of Wallace and Evans, was some evidence of their ability to furnish the money. And there was further evidence of their ability. Wallace testified to it, not perhaps with absolute certainty; but the testimony was received without objection, and we have found no evidence to the contrary. The defendant's own testimony, when called as a witness by the plaintiff, indicated that he was satisfied with their ability. The question was plainly for the jury. The testimony as to their reputation for financial ability was competent for the purpose for which it was admitted. *Coleman v. Lewis*, 183 Mass. 485. *Commonwealth v. Loewe*, 162 Mass. 518. The testimony as to the character and magnitude of the financial institutions with which they respectively were connected

was competent for the same purpose. The plaintiff is correct in his contention that the jury had a right to know what kind of men it was with whom the defendant thought that he was dealing.

7. The twenty-third request rightly was refused. If there was an agreement between the plaintiff and the defendant for the payment of a fixed sum of money, and the right to require that payment had accrued, it could be recovered in a count upon an account annexed. *Lovell v. Earle*, 127 Mass. 546.

8. The testimony as to the defendant's offer of a commission to Endicott if the latter would bring about a sale of the defendant's property to the United Shoe Machinery Company was not incompetent. It tended, or in connection with other evidence might have tended, to show a motive for the defendant's desire to secure an agreement for the supply of money from New York parties and for his then abjuring and causing the abandonment of that agreement. It showed or might show his desire to induce the Shoe Machinery Company to make the purchase from him by leading it to suppose that he was about to carry on an active competition with it. It tended to show the existence of a motive in his mind to do what the plaintiff asserted and the defendant denied that he had done. It comes under the rule of *Bock v. Wall*, 207 Mass. 506. Testimony of the amount afterwards obtained by the defendant from that company cannot be said to have been incompetent. It could be admitted in the discretion of the judge. It showed or tended to show that the defendant had succeeded in what the plaintiff contended was his object, the obtaining of better terms from the Shoe Machinery Company. *Wheeler v. Bornstein*, 214 Mass. 595, 597.

9. The defendant has no right of exception to the exclusion of the evidence offered by him that on the evening of September 22 he made a proposition to some Western shoe manufacturers which was less favorable to him than the one which it was contended that he had declined to make, or had avoided when made, with the Central Trust Company Associates. Upon the defendant's testimony as to his negotiations with Endicott and Winslow for a sale to the United Shoe Machinery Company, and his further testimony that on the night of September 19 or 20 he had agreed with Winslow upon the terms of such sale, it is hard to

see how the excluded testimony could have helped him. At any rate, it was not competent against the plaintiff.

10. Nor has the defendant any right of exception to the exclusion of his testimony as to his reason on September 14 for not having an examination of his machinery made. Both the plaintiff and the defendant had testified as to the reason which he assigned for his action. His undisclosed reason of course was not competent. *Emery Manuf. Co. v. Rood*, 182 Mass. 166, 168, 169.

11. The defendant was not entitled as of right to contradict the statement made by the plaintiff's counsel in opening the case that the defendant had made an admission to Boynton. The judge told the jury that this statement was not evidence. There was nothing here for the defendant to deny, and he cannot complain that he was not allowed to make a denial.

12. The plaintiff's counsel in examining the defendant as a witness asked him if he had dictated to any one what took place at the interview of September 8; and the defendant answered that he had, to his attorney. The counsel then asked him, reading from a paper: "Did you tell him that 'In my last interview I had no intention of trading with the New York people, particularly in view of their determination that they would dictate the terms on which the sale to the U. S. M. Company should be made. I did n't however, want them to know this, and particularly told them about a new indebtedness of \$200,000 not previously mentioned, and said that I could finance this in Boston, although I knew I could n't, and it was arranged that they would send over their experts as soon as I notified them that I had arranged for this loan.' Did you give that statement?" The witness answered: "Something on that order. I will not say you have not quoted it accurately. I will not say that I did not make that statement in exactly the words that you have read." This was competent and material testimony, and was not objected to. Neither the defendant nor his counsel asked then to see the paper. Afterwards, while the defendant was putting in his case, and before calling him as a witness, the defendant's counsel asked for this paper, and the plaintiff's counsel, admitting that he had it, refused to produce it. The plaintiff's junior counsel was then put upon the stand, and was asked by the defendant's counsel

whether this paper was one written or dictated by the defendant, whether it was a fact that the paper did not contain the language recited in the question above stated, whether the plaintiff's counsel in putting the question had in his possession a paper that had been dictated by the defendant to one of his counsel, and whether he declined to produce this paper. He was asked also whether at the time of making the answer the plaintiff's counsel had a paper in his hand, whether he appeared to read from it, whether the defendant had in fact dictated a paper containing some of the words appearing in the question, and whether a paper shown to the witness was the one that he had in mind. Each one of these questions was excluded on the objection of the plaintiff, and the defendant excepted. The defendant was called, and testified that he had seen the typewritten report of the testimony containing the above question and answer, and that he did not dictate to any one any paper containing those words, that the words which he understood to be in the question were not there. The defendant offered to show by him that at the time of putting the question the plaintiff's counsel had a paper in his hand and appeared to read from it. He was asked also by his own counsel if he had, at the time of answering that question, dictated a paper containing some of those words and some different words. He was shown a paper, and asked whether that was the paper which he had in mind, and that paper was offered in evidence. All this was excluded upon the plaintiff's objection; and the defendant excepted.

We need not consider whether the defendant, if he or his counsel had requested it, would not have had a right to see the paper from which counsel was reading, before he could be required to answer questions which, really or apparently, asked about its contents. *Smith v. Plant*, 216 Mass. 91, 103. *Regina v. Ford*, 5 Cox C. C. 184. 1 Wigmore on Evidence, §764. No such request was made, but the question was put and answered without objection.

The evidence was not put in by the plaintiff to show the contents of the statement dictated by the witness, but as proof of his declarations material to the issues on trial. The testimony was primary evidence of his oral admission rather than secondary evidence of the contents of the paper written from what he

said. *Smith v. Palmer*, 6 Cush. 513, 520. *Loomis v. Wadhams*, 8 Gray, 557, 562. *Commonwealth v. Wesley*, 166 Mass. 248, 252. *Clarke v. Warwick Cycle Manuf. Co.* 174 Mass. 434. The distinction is clearly stated in *Purinton v. Purinton*, 101 Maine, 250. See also *Morey v. Hoyt*, 62 Conn. 542, 556; *Taylor v. Peck*, 21 Gratt. 11, 20. *Slatlerie v. Pooley*, 6 M. & W. 664. The objection, as a matter of right, was taken too late. *Boyle v. Columbian Fire Proofing Co.* 182 Mass. 93, 99.

Some of the questions, to the exclusion of which exception was taken, were incompetent; others could be admitted only in the discretion of the judge. The paper which was offered by the defendant had not been in the possession of the plaintiff or used at the trial, and was incompetent. *Mair v. Bassett*, 117 Mass. 356. *Corcoran v. Batchelder*, 147 Mass. 541. *Fiske v. Cole*, 152 Mass. 335. See also *Flood v. Mitchell*, 68 N. Y. 507; *National Bank of Commerce v. Meader*, 40 Minn. 325, 329; *Sechrist v. Atkinson*, 31 App. Cas. (D. C.) 1. The questions relating to the way in which the first question was put were about matters which the jury had seen and to which the judge permitted the defendant's counsel to refer. No harm was done to the defendant by their exclusion. See upon the subject in general *State National Bank v. Weed*, 39 App. Div. (N. Y.) 602; *Duffey v. Consolidated Block Coal Co.* 147 Iowa, 225, 230; *McBride v. Sullivan*, 155 Ala. 166, 172. These exceptions also must be overruled.

We do not deem it necessary to discuss the other questions that are raised. We find no error in the proceedings.

Exceptions overruled.

LESTER NICKERSON'S (dependent's) CASE.

Suffolk. March 19, 1914. — May 25, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Workmen's Compensation Act.

The fact that an injury to an employee was occasioned by his disregard of an order of his employer is not decisive against him to show that he was "injured by reason of his serious and wilful misconduct" within the meaning of the workmen's compensation act.

Where a whitewasher employed in a factory had been directed to do the part of his work that was near the machinery and shafting during the noon hours when the machinery was not in motion, and, in answer to a question from him as to when he should do a certain wall near the shafting, was told by his employer's superintendent that it was to be done during the noon hour after the machinery was stopped and that it then was about half past eleven o'clock, and about five minutes later the whitewasher began to work at this place, expecting that the machinery would be stopped at noon when he would continue to work with the machinery at rest, but his clothing was caught by a projection on the collar of the shafting and he received injuries that caused his death, it was *held*, that the Industrial Accident Board were warranted in finding that this action of the employee in disobedience of an order was not "serious and wilful misconduct" within the meaning of St. 1911, c. 751, Part II, § 2, which would prevent an award of compensation to his dependent widow.

APPEAL from a decree of the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board.

The case was heard by *Wait, J.* The material facts relating to the question raised by the appeal and the finding of the Industrial Accident Board thereon are stated in the opinion. The judge made a decree awarding to Nora Nickerson as the dependent widow of Lester Nickerson, the deceased employee, a weekly compensation of \$6.50 for a period of three hundred weeks from August 1, 1912. The insurer appealed, contending that the injury which resulted in the death of the employee was incurred by reason of his serious and wilful misconduct and that therefore under St. 1911, c. 751, Part II, § 2, his dependent widow could receive no compensation.

R. H. Willard, for the insurer.

J. M. Hoy, (*S. T. Crawford* with him,) for the dependent widow.

SHELDON, J. The insurer contends that this injury happened by reason of the employee's "serious and wilful misconduct," and so that no compensation can be awarded therefor. St. 1911, c. 751, Part II, § 2. He was employed to do general cleaning, painting and whitewashing. Some of his work had to be done near machinery and shafting, which when in motion would involve danger; and he had been directed to do this work during the noon hours, when the machinery was stopped. At about half past eleven o'clock on the forenoon of the day on which he was injured, the superintendent, in answer to a question from him about work on a wall near the moving shafting, said to him,

"We will do that during the noon hour, after the machinery is stopped," and told him also that it was about half past eleven and that he (the superintendent) would find out the correct time and report it to him. The employee went to work at this place about five minutes later, expecting that the machinery would be stopped at noon, when he would continue the work with the machinery at rest. His clothing was caught by a projection on the collar of the shafting, his body was drawn around the shafting, and he received injuries which caused his death.

"Serious and wilful misconduct" is a very different thing from negligence, or even from gross negligence. *Burns's Case*, ante, 3. *Johnson v. Marshall, Sons & Co.* [1906] A. C. 409. It resembles closely the wanton or reckless misconduct which will render one liable to a trespasser or a bare licensee. See *Romana v. Boston Elevated Railway*, ante, 76, and the cases there cited on page 83. Its existence under any particular circumstances is usually a question of fact. *Leishman v. Dixon*, 3 B. W. C. C. 560. *George v. Glasgow Coal Co.* [1909] A. C. 123. *Bist v. London & South Western Railway*, 96 L. T. (N. S.) 750.

Here the Industrial Accident Board has found, in accordance with the report of the arbitration committee, that this was not "serious and wilful misconduct"; that "the shafting and machinery were about to stop at any moment, in the mind of this employee, when he could continue to work with absolute safety. His decision to do some whitewashing in this very brief interval seems more like a sudden thought than a wilful act. It seems that it should fairly be regarded as a minor transgression, at most, from his standpoint, and not as serious and wilful misconduct."

Unless this finding is shown to be unwarranted upon the evidence, it now is conclusive. *Donovan's Case*, 217 Mass. 76. *Bentley's Case*, 217 Mass. 79. *Diaz's Case*, 217 Mass. 36. We cannot say that it was unwarranted. The fact that the injury was occasioned by the employee's disobedience to an order is not decisive against him. To have that effect, the disobedience must have been wilful, or, as was said by Lord Loreburn, in *Johnson v. Marshall, Sons & Co.* [1906] A. C. 409, 411, "deliberate, not merely a thoughtless act on the spur of the moment."

This case comes well within the rule of the decisions which have been cited. The decree of the Superior Court must be affirmed.

So ordered.

INHABITANTS OF REVERE vs. REVERE WATER COMPANY.

Suffolk. March 19, 20, 1914. — May 25, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Equity Jurisdiction, Rescission. Contract, Rescission, Modification. Revere. Waterworks. Municipal Corporations, Power to borrow money for waterworks.

Jurisdiction of a suit in equity for the rescission on the ground of fraud of a contract of sale and of a conveyance made in accordance therewith cannot be retained for the purpose of changing material stipulations of the contract as to the price to be paid by the purchaser after proper findings have been made that no fraud entered into the transactions.

In a suit in equity by the inhabitants of the town of Revere against the Revere Water Company, seeking to have declared void the contract of sale of the defendant's waterworks to the town which was held in *Seward v. Revere Water Co.* 201 Mass. 453, to have been authorized by the town and to be in accordance with its votes and with statutory authority, that decision was affirmed and, on findings made by a master, it was held that the contract was not made under any mutual mistake; *and also*, that the fact, that the amount of the bonds to be issued in accordance with the contract was in excess of the debt limit of three per cent of the last tax valuation prescribed by R. L. c. 27, § 4, was not material, it appearing that it did not exceed the limit of ten per cent of that valuation prescribed by R. L. c. 25, § 32, as to bonds issued for the purchase of such rights.

In the same suit it was held that the purchase by the town from the company was not consummated by the vote of the town, but only by the conveyance of the property to the town, so that until such conveyance the company was entitled to the net profit of its business and was not subject to certain provisions of the contract relating to amounts spent for new construction.

BILL IN EQUITY, filed in the Superior Court on February 11, 1909, and there amended and removed to this court, where it further was amended several times, seeking to have an agreement of sale between the town of Revere and the Revere Water Company (hereinafter called "the company") and the sale and conveyance made in accordance therewith declared void on the ground of fraud, and for certain other relief hereinafter described.

The suit was referred to Boyd B. Jones, Esquire, as master. In his report, filed on March 29, 1913, he stated the purposes

of the suit when it was heard by him to be as follows: "The town seeks by this suit to have the court annul a contract of sale and purchase between it and the company, dated April 15, 1904, as modified by an agreement dated December 31 of the same year, a deed from the company to it of the waterworks in Revere and other property of the company, and a vote of the town accepting St. 1904, c. 457, authorizing the town to acquire the property thus conveyed and to issue bonds for the purpose of paying for it. The town also asks that bonds to the amount of \$360,000, received by the company under the contract of sale and purchase, should be returned to the town by the company. . . . It was claimed by the town at the hearing that the price paid for the property was from \$150,000 to \$200,000 in excess of its fair value, and that the agreement to purchase, and the payment of that price, was obtained by the company because of certain false representations made by the company and its agents."

The transactions which formed the subject matter of the suit were as follows:

On May 3, 1904, the town of Revere, acting under the authority of St. 1882, c. 142, § 7, the charter of the defendant, adopted a contract of purchase of the company's plant and property, dated April 15, 1904, and to be performed January 1, 1905, at the price of \$350,000 in addition to the value of stock and tools on hand and new construction, payable in the bonds of the town. One provision of this contract was that after its adoption the company should undertake no new construction without the committee's consent in writing.

On petition of the town St. 1904, c. 457, was enacted, authorizing the town to supply itself with water, § 11 forbidding it to do so until it should have purchased the company's property (except its property in Winthrop) on the terms of the company's charter, and § 5 authorizing the issue of bonds not exceeding \$400,000 for the purchase. The act, being subject to acceptance by the town, was accepted at a meeting held on October 24, 1904, and at the same meeting the town voted to "purchase the property, rights and privileges of the Revere Water Company, excepting the property situated in the town of Winthrop, in accordance with the provisions of chapter 457 of the acts of 1904."

On December 29, 1904, the town, not being ready to complete

the purchase, instructed its committee to procure and execute with the company an extension of "the time for completion of the purchase of the company's property under the agreement dated April 15 and the votes of the town of May 3 and October 24, 1904." Under this vote a contract was executed on December 31, extending the time for completion of the purchase to April 1, 1905, the company to operate the plant and have the earnings until that time. At an adjournment of this meeting, January 2, 1905, the contract of extension was presented, and the town voted to issue \$360,000 bonds, to be sold and delivered to the company "in payment for its property under and according to the agreement of purchase dated April 15, as extended by agreement dated December 31, and the votes of the town of May 3 and October 24, 1904, so far as necessary therefor."

On April 1, 1905, the purchase was carried into full effect in exact accordance with the contract of April 15, 1904, and the foregoing votes, the company deeding the property to the town and the town paying with its bonds the purchase price of \$350,000 plus \$2,358.98, the value of stock and tools on hand, and \$2,560.09, the value of new construction, as ascertained by the town's engineer in accordance with the contract, the town subsequently, after collection of the water rates in July, accounting to the company for the earnings to April 1. The town took and thereafter retained possession and management of the property.

As to the allegations of fraud and false representations in the amended bill, the master found as follows:

"I find and report that the town committee referred to was not selected or appointed by Burnham [then a director, superintendent of, and stockholder in the company,]; that it was made up of disinterested persons from various walks of life, including members of the legal and medical professions, that it was not actuated by motives other than that of promoting the welfare of the town; that before arriving at any conclusion or making any report to the town it had become satisfied that any judgment it might form upon its independent and unassisted investigation would not warrant municipal action upon a matter of so much importance, and had employed a hydraulic engineer of good standing, one Freeman C. Coffin, upon whose recommendations and advice it relied and acted in making its own reports to the town. It was

admitted by the town that the engineer acted in good faith, and not in collusion with the company.

"I also find that in dealing with the legal questions which arose the committee acted upon the advice of reputable and competent lawyers, of whom one was attorney for the town and the other was a member of the committee. I further find that these lawyers were in no respect under the influence or control of the company, and that, in advising the committee and in representing it and the town, they were actuated only by a desire to guard the town's interests.

"I find that neither the company nor any person sustaining the relation of officer, stockholder, agent, or otherwise to the company, made any representation to the town, or to its committee or to any one representing it, as to either the condition or adequacy of the water system or property sold to the town. On the contrary, it affirmatively appeared from the evidence introduced by the town, and I find, that the committee adopted the views of its engineer upon these matters and that he formed his conclusions as to the adequacy of the system from the length and dimensions of the water pipes and such examination of the pipes and system as he deemed it necessary to make. The dimensions of the pipes and their ages he obtained from the records of the company and from Mr. Burnham. . . . The information which the engineer thus obtained was correct. . . .

"Neither the engineer, the committee, nor the town acted or were influenced by any representation made by the defendant or any one representing it as to the value of the whole or any part of the system purchased by the town. The committee relied on the valuations made by the engineer. . . .

"I further find and report that the earnings and expenses of the company were not falsely stated by it, or any one representing it, but that, on the contrary, the company's earnings and expenses were fully and correctly disclosed to the engineer, and appear in his confidential report to the committee. . . .

"I find on all the evidence in the case, that the town in making the purchase relied wholly upon the advice and recommendations of its committee and an engineer employed by that committee; that the committee and engineer acted honestly, and that neither the company nor any one representing it or interested in it made

any false representation or were guilty of any fraud or concealment, and further that Burnham did not occupy, and was not understood by the town or any one representing it to occupy, any relation of trust and confidence to the town."

The master also found that "the valuation of the town of Revere on May 1, 1904, was \$12,197,225; and that on May 1, 1905, it was \$12,263,200. On April 15, 1904, the town indebtedness was \$295,750; on May 3, 1904, it was \$430,750, and on October 24 the town indebtedness was \$452,775."

During the hearings before the master on February 3, 1913, the plaintiff filed a motion to amend the prayers of the bill. This motion was allowed by a decree dated October 21, 1913, after the master's report was filed. As thus amended, the prayers of the bill were (1) "that each and every one of the alleged contracts between said company and said town or said committee purporting to fix the price to be paid by said town to said company, and to fix the conditions of said sale, purchase, and transfer, be declared null and void; (2) that the alleged deed of conveyance from said company to said town be cancelled, and that said company be ordered and decreed to execute and deliver forthwith to said town a proper and sufficient deed for the property and rights purchased by said town; (3) that said company be ordered to account to said town for the town of Revere waterloan bonds now in its possession or control, and for the par value of any of said bonds which have been sold, transferred, or otherwise disposed of by said company, and for all money paid to said company by said town or its agents on or after April 1, 1905; (4) that said company be ordered to account to said town for the care of, and for the rents, income, and profits derived from, the property and rights of said company during the time said company remained in possession and control of said property and rights from and after the date of the purchase by said town;" (5) that commissioners be appointed to determine the compensation to be paid by the town for the property and rights of the company purchased by the town; (6) for damages; (7) for a receiver; (8) that the company be enjoined "from distributing or expending any of the money, funds, or credits now in its control or possession or owed to it until the final disposition" of the case, and (9) for general relief, "to the end that said company

shall not profit unjustly and illegally at the expense of said town."

By order of *Loring, J.*, exceptions of the plaintiff to the master's report were overruled, the report was confirmed, and a final decree was entered dismissing the bill with costs.

The plaintiff appealed.

The plaintiff's brief contained the following statement: "The town agrees that it became, and is now, the owner of so much of the water system as it was authorized to purchase, and that the Company is entitled to payment for the fair value thereof." The plaintiff argued that the sale was consummated at the time of some one of the votes of the town previous to April 1, 1905, when the conveyance was made, and therefore that the town was entitled to what the company had received as net income since that time (whichever should be selected) and should not have been charged in the accounting and adjustment immediately following the purchase with expenditures for new construction made since such date, but should be allowed to recover what sums were so charged to it.

R. Walsworth, for the plaintiff.

A. E. Pillsbury, (*G. M. Palmer* with him,) for the defendant.

SHELDON, J. This bill was brought to rescind the sale to the plaintiff of the defendant's waterworks and plant, for alleged fraud of the defendant. Upon the facts found and reported by the master, that contention cannot be maintained. If this report is confirmed, yet the plaintiff, though not rescinding its purchase but retaining the property acquired thereby, now seeks to set aside the stipulation for the price which it was to pay, and to have the amount thereof determined anew, by making certain deductions from the agreed amount thereof. Equity cannot do this; it would be to make a new agreement for the parties. *Non constat* that the agreement would have been made at all if one of its material stipulations had been altered. If the town has a right to recover any of the sums claimed here, that right must be enforced at law. *Andrews v. Moen*, 162 Mass. 294. *Tuttle v. Batchelder & Lincoln Co.* 170 Mass. 315, 317. This fundamental objection to the maintenance of the bill goes deeper than the cases cited. The bill seeks to rescind the whole agreement; it cannot be maintained for the mere elimination of one of its material

elements and the substitution of something else which the parties did not agree upon. It is of no consequence that one party, or even that the court, might think that the proposed substitution was of something that the parties properly might have agreed on. See *Coffing v. Dodge*, 167 Mass. 231, 233.

The agreement was not void upon its face. It was in accord with the statutes under which it was made. *Seward v. Revere Water Co.* 201 Mass. 453. It was authorized by the town. It was not made under any mutual mistake. That the amount of the bonds to be issued thereunder was in excess of the statutory debt limit is not material because of the purpose for which they were issued. R. L. c. 25, § 32; and c. 27, § 2.

This was not a purchase accomplished by the very vote of the town; it was an agreement, carried into effect by a subsequent sale and purchase. The property did not pass to the town upon the passage of the vote, but only upon the consummation of the transaction. Such cases as *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, and *Rockport Water Co. v. Rockport*, 161 Mass. 279, do not apply here. Accordingly, if it could maintain the bill, the plaintiff could not recover the amount received as income or the amount spent for new construction in the meantime.

So far as the plaintiff's exceptions to the master's report are not covered by what has been said, we see no occasion to discuss them. None of them can be sustained.

The decree dismissing the bill must be affirmed with costs.

So ordered.

CHARLES W. KERR vs. EUGENE N. SHURTLEFF.

Suffolk. November 20, 1913.—May 25, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Deceit. Evidence. Practice, Civil. Conduct of trial: judge's charge, Exceptions. *College of Physicians and Surgeons of Boston. Damages, In tort.*

If, at the trial of an action for deceit in falsely asserting to a student, considering entrance into a certain college for the procuring of a degree in dentistry, that the college gave the degree of D.M.D., the plaintiff in direct examination testifies that the false statement was made to him orally and was, "We can fix

you up nicely in three years, make you a D.M.D.," and in cross-examination testifies that the statement was, that the college would make him a D.M.D., it is for the jury to determine whether the statement testified to on direct examination was made.

- A statement by the general agent of a college to a student who is considering entering the college in order to gain an education in dentistry and a degree therein, "We can fix you up nicely in three years, make you a D.M.D.," is in effect a statement that the college has authority to grant that degree; and, if the college has no such authority, the statement may be found to have been not merely a promise, but a false statement of fact.
- A representation, by the general agent of the board of trustees of a medical college to a student considering entrance into the college for the purpose of procuring, through a three years' course of study, an education and a degree in dentistry, that the college could grant such a degree, is a material representation, and, if the statement was false and was made by the agent as of his own knowledge without his knowing it to be true or false and for the purpose of inducing the student to act upon it, which, without knowing of its falsity, the student did to his loss, the student may maintain an action for deceit against the agent.
- At the trial of an action for deceit against the general agent of a medical college for falsely representing to the plaintiff that the college had authority to grant a degree in dentistry, the judge, subject to an exception by the defendant, instructed the jury in substance that, if they were satisfied that the defendant made an absolute promise to grant the degree to the plaintiff, at the time having no intention to carry out such promise, and that he made it for the purpose of deceiving the plaintiff, they should find for the plaintiff. There was no evidence calling for such an instruction. The jury found for the plaintiff. *Held*, without considering whether the instruction would have been correct if there had been evidence to which it was applicable, that the exceptions must be sustained.
- In an action for deceit against the general agent of a medical college for falsely representing to the plaintiff that the college had authority to grant a degree in dentistry, if it appears that the representation was made and that it was false, and that the plaintiff passed all the examinations of the college qualifying him for the degree, it is no defense to the action that a condition of the granting of the degree which was one of the regulations of the college, that three fourths of the faculty should consent to it, was not complied with because, at the meeting of the faculty when the plaintiff's record was considered, less than three fourths of the members were present.
- St. 1883, c. 153, § 1, incorporating The College of Physicians and Surgeons of Boston did not give authority to that corporation to grant the degree of *Dentariæ Medicinæ Doctor*.
- If, in taking an exception to a portion of a charge of a judge to a jury, no reference is made to the state of the pleadings as a basis of the exception, it is not open to the excepting party in this court to support the exception on that ground.
- In an action for deceit against the general agent of a medical college for falsely representing to the plaintiff in 1908, when he was considering entering upon a course of study in dentistry, that the college had authority to grant a degree in dentistry, where it appeared that it had authority only to grant the degree of Doctor of Medicine and not a degree in dentistry, exceptions taken by the defendant to the admission in evidence at the trial of statements by the defendant to other physicians, one in 1909 and another in 1910, tending to show

that the defendant did not know whether the college had the right to grant the degree, must be overruled because the evidence was admissible on the issue, whether the defendant made the statement to the plaintiff as of his own knowledge without knowing whether it was true or not; and an exception by the defendant to the admission of evidence that in 1909 the defendant had said to another physician that the college had a right to grant the degree because of their having the right to grant the degree of Doctor of Medicine, and that, having that right, they had the right to grant any degree in medicine, must be overruled because, so far as it was material, the evidence helped and did not harm the defendant.

In such action the plaintiff is not entitled to have considered, as bearing upon the question of damages, what he paid for tuition, because the measure of the damages to which the plaintiff is entitled in case the defendant is liable is the difference in value between what the plaintiff received and what he would have received if the representations of the defendant had been true. In this case, it appearing that the plaintiff had received an education in dentistry without a degree, and that, if the representations of the defendant had been true he would have received both the education and the degree, the measure of damages was held to be what it would cost the plaintiff in time and money to get the degree in dentistry.

In the same action, in sustaining exceptions of the defendant and ordering a new trial, it was said that because, if the jury found that the alleged statement had been made by the defendant, it was a statement of fact although it involved a question of law, the trial judge had erred in ruling at the request of the defendant in substance that the statement made by the defendant as to the authority of the college to grant the degree of D.M.D. was "not a statement of a past or present fact," that the right of the college to grant that degree was a question of law, that the plaintiff could not recover for any misstatement by the defendant as to the legal right of the college to grant the degree, and that "a misstatement of the law cannot form the basis of any action for deceit."

LORING, J. This is an action of tort in which the plaintiff alleges that, to induce him to become a student in the College of Physicians and Surgeons, the defendant* falsely represented to him in the summer of 1908 that the college had authority to grant the degree of *Dentariæ Medicinæ Doctor* (D.M.D.) and that acting on that representation the plaintiff enrolled himself as a student, pursued a course of study for three years and passed all the examinations given him by his instructors, but failed to get the degree of D.M.D. by reason of the fact that the defendant did not have authority to grant it. The defendant rested on the plaintiff's evidence. The jury found for the plaintiff, and the case comes before us on exceptions taken by the defendant.†

* The general agent of the board of trustees of the college.

† The case was tried before Crosby, J.

In disposing of these exceptions we will follow, in the main, the defendant's brief.

1. The defendant has contended that, on the plaintiff's evidence, what was said by him (the defendant) was a promise and not a representation of fact. The plaintiff testified on his direct examination that the defendant said to him, "Well, we can fix you up nicely in three years, make you a D.M.D." That was in effect a statement that the college had authority to grant the degree of D.M.D. It is true that on cross-examination the plaintiff testified to a promise that the college would make him a D.M.D. and did not repeat the statement made by him on direct that we "can . . . make you a D.M.D." In this state of the evidence it was for the jury to decide whether the statement testified to on direct examination was made. *Tierney v. Boston Elevated Railway*, 216 Mass. 283. If it was made, a misrepresentation of fact was made by the defendant.

2. The next contention made by the defendant is that under the decision in *Dawe v. Morris*, 149 Mass. 188, the representation was immaterial. *Dawe v. Morris* was a case where to induce the plaintiff to make a contract with a railroad company to build a section of its road the defendant falsely represented to him that he and another person had bought enough rails at a certain price to build it, and that if the plaintiff entered into a contract with the railroad company they would sell the rails to him at the same price. It was held that this was a representation as to a matter not material to the contract there in question. We are of opinion that the case at bar does not come within that decision. The representation that the college could grant a degree of D.M.D., made to induce the plaintiff to take a three years' course in the college, was a material representation.

3. The presiding judge in his charge told the jury: "If you find . . . that the defendant promised the plaintiff that . . . the college would give him a degree at the end of a three years' course of study, and he did not get his degree, his degree was not given to him, then the plaintiff is entitled to recover, although the college had authority to grant it to him; if you are satisfied that there was an absolute promise on the part of the defendant to grant that degree, and you are satisfied that at the time the promise was made the defendant had no intention that that

promise should be carried out; that he had made the promise wrongfully and for the purpose of deceiving this plaintiff." We find nothing in the evidence stated in the bill of exceptions calling for an instruction on this point. For that reason the exception to this part of the charge must be sustained. Under these circumstances we do not find it necessary to consider whether the charge would have been correct if there had been evidence on which it could have been given. We do not intimate that it would have been correct.

4. The defendant contends that the plaintiff must fail because he did not get the necessary consent of the faculty to entitle him to a degree.* But on the evidence the jury could have found that the plaintiff passed all his examinations satisfactorily. If under these circumstances a degree was not conferred upon him it was not his fault.

5. We are of opinion that the college did not have authority to grant the degree of D.M.D. By St. 1883, c. 268 (now R. L. c. 125, § 10), it is provided that "No corporation organized for medical purposes under the provisions of chapter one hundred and fifteen of the Public Statutes shall confer degrees, or issue diplomas or certificates conferring or purporting to confer degrees, unless specially authorized by the Legislature so to do." By an earlier act passed at the same session of the Legislature, the college here in question was authorized "to confer the degree of Doctor of Medicine." St. 1883, c. 153, § 1. The prohibition is against conferring any degrees unless specially authorized. The special authority given is limited to conferring a specified degree, namely, the degree of Doctor of Medicine. Under these circumstances the college did not have authority to confer the degree of D.M.D.

6. The jury could have found that the representation of fact made by the defendant was made as of his own knowledge without his knowing it to be true or false. That made out a case of deceit. *Huntress v. Blodgett*, 206 Mass. 318, 324. *Adams v. Col-*

* The plaintiff testified that he knew that, before he could get the degree of D.M.D., it was necessary that three fourths of the faculty and a majority of the board of trustees should consent thereto. It appeared that, at the meeting of the faculty at which the plaintiff's application for a degree was considered, less than three fourths of the faculty were present.

lins, 196 Mass. 422, 428. *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403. See also *Montgomery Door & Sash Co. v. Atlantic Lumber Co.* 206 Mass. 144, 154. The defendant took an exception to that part of the judge's charge in which the judge so instructed the jury. He seeks now to support that exception on the ground that no allegation to that effect was inserted in the declaration. But the exception taken to this part of the charge did not refer to the state of the pleadings. Under these circumstances it is not now open to the defendant to support the ruling on that ground. See *Noyes v. Caldwell*, 216 Mass. 525.

7. Against the defendant's exception Dr. Robertson was allowed to testify that in 1910 he asked the defendant whether the college had a right to grant the degree of D.M.D., and the defendant told him that "he must go slow on that, but if they [meaning the students] could pass the State board first he may be able to grant them a degree;" and Dr. Gilbert, under the defendant's exception, was allowed to testify that in May or June of 1909, the defendant told him that he did not know whether the college had the right to grant the degree of D.M.D. or not. This evidence was plainly admissible on the issue whether the defendant made the statement as of his own knowledge without knowing whether it was true or not. The defendant also took an exception to the testimony given by Dr. Boynton, to the effect that the defendant in 1909 had told him that the college had a right to grant the degree because of their having the right to grant the degree of Doctor of Medicine; that, having that right, they had the right to grant any degree in medicine. This evidence, so far as it was material, helped the defendant and certainly did not harm him. All these exceptions to evidence must be overruled.

8. Although the defendant has contended to the contrary, on the evidence the jury were warranted in finding that the representation which the jury must have found he made to the plaintiff, was made to induce the plaintiff to act upon it and that the plaintiff did act and did rely upon it.

9. We are of opinion that the exception to the rule of damages laid down by the judge in his charge to the jury, was well taken. The judge told the jury that the plaintiff "is entitled to have considered, as bearing upon the question of damages, what he

has paid out as tuition." That was wrong. The rule of damages is the difference in value between that which the plaintiff in fact got and that which he would have got if the representation made had been true. *Thomson v. Pentecost*, 206 Mass. 505; *S. C.* 210 Mass. 223. *Morse v. Hutchins*, 102 Mass. 439. See also *Lee v. Tarplin*, 183 Mass. 52; *Whiting v. Price*, 172 Mass. 240; and *Nash v. Minnesota Title Ins. & Trust Co.* 163 Mass. 574, 581. What the plaintiff got was an education in dentistry; what he would have got if the representation had been true was an education in dentistry and a degree. The measure of damages, therefore, in the case at bar, is what it will cost the plaintiff in time and money to get a degree of D.M.D., not what he has paid out in getting the education in dentistry without the degree. The exception to this portion of the charge must be sustained.

10. As the case is to go back for a new trial, it ought to be pointed out that the judge should not have given the third, fourth and fifth rulings, which were given at the request of the defendant.* If the jury found that the defendant made the statement testified to by the plaintiff on his direct examination, it was a statement of fact although it involved a question of law. If that statement was made by the defendant, this was not a case where the defendant expressed his opinion as to the legal effect of facts there stated or otherwise known to the parties, but a statement that as matter of fact the college had the right to grant the degree of D.M.D. The distinction is established by the decisions made in *Burns v. Lane*, 138 Mass. 350; *Windram v. French*, 151 Mass. 547; *Burns v. Dockray*, 156 Mass. 135. And see *Jessel, M. R.*, in *Eaglesfield v. Londonderry*, 4 Ch. D. 693, 702, 703. To avoid misapprehension it is proper to add that it was stated in *Burns v. Dockray*, 156 Mass. 135, 138, that it is still an open

* "3rd. That the statement made by the defendant as to the authority of the College of Physicians and Surgeons to grant degrees of D.M.D. is not a statement of a past or present fact.

"4th. The right of the College of Physicians and Surgeons to grant degrees of D.M.D. is a question of law and the plaintiff cannot recover for any misstatement made by the defendant as to the legal right of the College to grant said degree.

"5th. A misstatement of the law cannot form the basis of any action for deceit."

question here whether an action for a false representation of law will lie.

Exceptions sustained.

H. Bergson, for the defendant.

J. L. Burns, for the plaintiff.

PETER HERBST & others vs. FIDELIA MUSICAL AND
EDUCATIONAL CORPORATION & others.

Essex. March 23, 1914. — May 25, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Voluntary Association. Equity Pleading and Practice, Parties, Appeal.

A bill in equity cannot be maintained by a voluntary unincorporated association in the name of the association. In the present suit, the association being described as composed of three individuals "and many other members too numerous to mention," the bill was treated as if it had been brought by those individuals suing in behalf of themselves and of all the other members of the association.

Where in a suit in equity, which was referred to a master, the hearing before the master was confined by agreement of the parties to two issues, all other averments of the bill being taken as admitted, a motion, presented to the master after the first draft of his report was submitted to the parties, seeking a reopening of the hearings for the hearing and reporting of evidence on certain specified issues, should be denied by the master, where it appears that some of the specifications in the motion relate to issues other than the two to which by agreement the hearings were confined and the master finds that those two issues have been fully tried; and, after the filing of the master's report, a motion to recommit it to the master based on the same grounds properly may be denied.

BILL IN EQUITY, annexed to a common law writ dated December 13, 1911, in which the plaintiffs were described as "the New England States Sangerbund, a voluntary association consisting of delegates from German singing societies situated in New England," composed of Peter Herbst, Herman Teichert, Joseph Reininger "and many other members too numerous to mention," and the defendants were the Fidelity Musical and Educational Corporation and certain of its officers and members.

The allegations of the bill in substance were that the San-

gerbund was formed for the purpose of holding a prize singing contest once in every two years at which a prize cup, which was under the control, supervision and disposition of the plaintiffs as a trophy or prize, was delivered to such singing society as might be awarded the first prize and was held by that society until the determination of the next contest; that among the rules and regulations of the contest, accepted by the participating societies, were rules that no competing society should employ any professional singers, that all singers should be regular *bona fide* members of the competing society, and that all members of the singing section of the competing societies should take part in a mass concert held at or about the time of the singing contest; that at a contest held at Pawtucket, Rhode Island, on July 2, 1911, the first prize was awarded by judges to the defendant corporation, subject to protests because of alleged infractions of the above described rules and regulations by the defendant corporation, and that later the cup was delivered to the defendant corporation, that defendant agreeing that it would return it to the plaintiffs if upon a hearing held on the protests the Sangerbund should find that the rules and regulations had been violated as charged; that a hearing was held at which the defendant corporation was represented and heard, that it was found by the Sangerbund that the defendant had violated the rules and regulations and it was ordered that the cup be returned; but that the defendants refused to return it. The prayers of the bill were for an order for a return of the cup.

The suit was referred to H. Ashley Bowen, Esquire, as master, "to hear the parties and their evidence and report his findings to the court, together with such facts and questions of law as either party may request."

The master's report contained the following findings:

"No question was raised by the defendant as to the adequacy of the protest, the regularity of the meetings of the plaintiff, or the authority of the plaintiff to bring the bill of complaint, and it was agreed that aside from two questions, the allegations in the plaintiff's bill should be taken as true." These questions were, whether the defendant corporation employed professional singers in their behalf at the song fest, and whether a number of these men who competed for the defendant corporation were not *bona*

fide members of the club in accordance with the rules and regulations of that association.

Both counsel agreed that, if the defendants violated the by-laws bearing on the question just stated, it was not entitled to the cup which it admitted it held upon the claim that it was duly awarded it, and that it had violated none of the plaintiffs' by-laws.

It was agreed by the parties that the material portions of the by-laws of the defendant relating to membership were as follows: "Article III, Section 3: Proposals for membership must be presented to the executive board whose duty it will be to examine the candidate and report at the next following meeting of the society, whereupon the names are placed on the slate. Candidates must be presented at the meeting before being voted on, and must receive three-fourths of the votes in his favour. Admission fee into the society to be two dollars, and must be paid to the treasurer at the time of the proposal. Section 4: Each member pays annually two dollars in quarterly payments in the months of March, June, September and December."

The records of the defendant corporation showed a vote passed by the members of the defendant under date of January 6, 1910, that "English speaking members can be taken into this club, and these candidates have to be taken in the same as any German member." This vote appeared not to have been rescinded or affected by any subsequent action of the members of the defendant corporation. On September 29, 1910, the executive board passed a vote "that singers shall be taken into the club without paying the entry fee, without dues for the year" and that "the executive board shall take the singers in themselves, the executive board alone."

"It appeared by uncontradicted evidence, that the executive board of the defendant purported on November 3, 1910, to admit to membership in the defendant eleven passive members; on November 24 the executive board purported to elect to membership nineteen passive members; on December 29, 1910, the executive board purported to elect to membership five passive members. It was a practice in this corporation for the executive board's records to be read and approved at the first meeting of the corporation following the meeting of the executive committee. This record of September 29 quoted was read and approved by

the corporation, likewise were the subsequent records of meetings of the executive board, at which it purported to admit the members referred to on November 3, November 24 and December 29. No other action was taken by the defendant, either to authorize the executive board to elect members, or to vote on the admission of these members as approved by the executive board. Just how many of these thirty-five men took part in the song festival was not definitely shown. Several of them did. None of these men have ever paid admission fee or dues.

"During this period between September 29, 1910, and June 1, 1911, applicants for admission to regular membership of the defendant were admitted to the corporation in the manner prescribed by Section 3 of Article III of the by-laws of that corporation, quoted above.

"Two of the men who were among the number purporting to have been admitted by the executive board of the defendant alone, and who participated in the song festival for the cup in question, were singing regularly in church quartets, and received money as compensation for their services, though both had other business which consumed the larger part of their time. Both had sung in church quartets for a number of years before, and had received money as compensation therefor, and one of them had previously been a member of a quartet which made a business of singing whenever engagements could be secured, up to and about a year before the song festival in question.

"The term 'professional singer' appears not to have been used in any special sense; was never defined by the association, and if it is within my province to find whether or not these men were professional singers, I find in the affirmative; that singing was a part of their business which they professed to understand and to follow for subsistence."

After the submission by the master to the parties of his draft report, the defendants filed with him a motion that the hearing be reopened for the hearing and reporting of evidence on issues other than those to which the master had found that the hearing was confined by agreement of the parties, and also of further evidence (not further described in the record) on those two issues. The master denied the motion, finding that all other questions than those contained in the two issues described by the master

were expressly waived by the defendants, and that those two "issues were fully heard, unless certain testimony which was excluded as not being competent should have been admitted, and as to this testimony, the question of its admissibility cannot be determined by a reopening of the case. Moreover, this testimony as stated in substance by counsel, even if admitted would not alter the finding."

The defendants submitted ninety-seven requests for rulings to the master, filed seventy-four objections to the report and thirty-five exceptions based on the objections. Of the exceptions, twenty-eight related solely to findings of fact made by the master, to refusals by him to make findings of fact requested by the defendants, to refusals by him to make rulings of law, and to refusals to report evidence on questions not relating to the exclusion or admission of evidence.

The eighteenth exception was to the exclusion by the master "of testimony of several of the defendant's officers who were present at the defendant's monthly meetings next following the executive board's meetings of October 27, November 24 and December 29 of 1910 as to the methods employed by the defendant in 'Reading and approving' said votes of the executive board."

The only mention in the record of testimony by an officer of the defendants, stated in the record to have been excluded, was as follows: "The question was asked by counsel for the defendant of Frank Kreiz, who was treasurer of the club and a member of the executive committee, in October, 1910, 'Whether or not it was recommended that the by-laws should be suspended at that time?' It was objected to by counsel for the plaintiff and the objection was sustained on the ground that it was secondary evidence and no basis had been laid therefor, the record of the meeting not having been put in evidence."

The twenty-second, twenty-third, twenty-fourth and twenty-fifth exceptions were in substance to the exclusion by the master of "all evidence both by experts and regular witnesses, bearing upon the true interpretation of the term 'professional singer' as applicable to singing societies," and particularly to testimony of one Thomas H. Rollinson, of one Hugh J. McGinnes, of one Fritz Afholderbach and of one Benjamin Gluckenberger. The only

evidence of the nature described shown in the record to have been excluded was the following:

Rollinson, the musical editor and department manager of Oliver Ditson Company, testified that as an incident to his work he had occasion to study music and musicians, and had written several articles thereon; that he had been in contact with professional and amateur instrumental musicians and had discussed with them the question of professionalism in music; and that he supposed that "the same word" applied to instrumental musicians as to singing musicians as to the interpretation of the term "professional." He then was asked the following questions, all of which were objected to, and the objections were sustained: "What is your attitude with regard to it?" "What constitutes a professional musician or singer?" He then testified that he was not familiar with the practices that prevail among German singing societies of the State of Massachusetts with regard to the term "professional singer" although he was familiar with that practice as it prevailed among other musical societies or band societies, and that he had not made an investigation as to the use of the words "professional singer" in German singing societies in the State of Massachusetts.

Hugh J. McGinnes testified that he was a member of the Providence Maennerchor and sang on July 2, 1911, at Pawtucket; that the Providence Maennerchor was one of the societies constituting the New England Sangerbund. He then was asked if he sang for money, and whether he ever sang for money outside. The questions were objected to, and the objections were sustained.

Franz Afholderbach was asked, "Do you know whether or not efforts were made to keep professional singers from singing in the Fidelity in 1911?" The plaintiffs objected and the objection was sustained.

The only testimony of Gluckenberg which the record shows was excluded is the following question: "Has any evidence been presented by the plaintiff to the effect that every member of this organization must have been a member six months before the prize singing July 2, 1911?"

The defendants' twenty-ninth exception was to the ruling of the master denying its motion to reopen the hearing.

A motion to recommit the report to the master, based on

grounds similar to those stated in the motion to reopen the hearing before the master, was denied, the exceptions were overruled, the report of the master was confirmed and a final decree for the plaintiffs was ordered by *Fox, J.* The defendants appealed.

The case was submitted on briefs.

G. B. Hayward & R. H. O. Schulz, for the defendant corporation.

J. C. Sanborn, for the plaintiffs.

SHELDON, J. This bill, though wrongly entitled, is treated as if brought by the individuals named in it as plaintiffs, suing in behalf of themselves and all the other members of the voluntary association. It could not have been maintained by the voluntary association itself. *Pickett v. Walsh*, 192 Mass. 572, 589. *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 111.

At the hearing before the master, only two questions were in dispute, and it was agreed that in other respects all the averments of the bill were admitted. Those questions were whether the defendant corporation had employed professional singers in the prize singing contest and whether some of those who competed for it in that contest were not *bona fide* members thereof. The constitution and by-laws of the plaintiffs' association provided that no professional singers should be employed; and it was agreed that if the defendant corporation had violated those by-laws, it was not entitled to hold the cup for the possession of which the bill was brought.

These two issues were found against the defendants. Unless some of the exceptions to the master's report should have been sustained, or the report should have been recommitted to the master, it is plain that the decree against them was correct.

The judge was not bound to grant the motion to recommit. No reason appears why there should be any hearing as to matters which once had been agreed; and it is not, and apparently was not, shown that as to matters which were contested there was any real occasion for a further hearing. The motion rightly was denied.

We see no ground for sustaining any of the exceptions to the report. Those which relate to findings of fact must be overruled, because we have not before us all the evidence. Many of the others are immaterial, and ought not to have been argued. We find no error in any of the rulings of the master that have been

excepted to upon the admission or exclusion of evidence. As to several of these, it does not appear what evidence was ruled upon, and for that reason no error is shown. The master was not ordered to report the evidence and properly declined to do so. His refusal to reopen the hearings for the admission of further evidence before settling his final report does not appear to have been erroneous.

The order in the final decree that "the defendant" return and redeliver the prize cup to the plaintiffs was intended without doubt to include all the parties defendant. It should be modified to make that certain. With that modification, the decree is to be affirmed with the costs of this appeal.

So ordered.

JOSEPH M. HERMAN *vs.* CONNECTICUT MUTUAL LIFE INSURANCE COMPANY & others.

Suffolk. March 23, 1914. — May 25, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Equity Jurisdiction, Equitable replevin. *Assignment*. *Estoppel*. *Insurance*, Life. *Bills and Notes*, Validity.

One who received an assignment of a policy of life insurance from the insured without the policy itself, which by reason of fraud of an agent of the insured was not delivered to him, may maintain a suit in equity for possession of the policy against a person to whom it has been delivered by the agent without right and who secretes it so that it cannot be reached in an action at law.

An assignment of a policy of life insurance by the insured is valid as between him and the assignee, although the policy is not delivered to the assignee and although a provision of the policy, that no assignment of it "shall be valid unless made in writing, and a duplicate or certified copy thereof be filed at the office of said company," is not complied with.

A policy of life insurance is a non-negotiable chose in action, and, if by his own voluntary action the insured or one to whom the insured has assigned his rights so clothes a third person with the *indicia* of ownership as to justify others in regarding him either as the rightful owner or as having authority from that owner to transfer the policy, the owner or a rightful assignee is estopped to set up his title against a *bona fide* purchaser for value from such third person.

An assignment of a policy of life insurance was given by the insured with the policy to an agent of the company to deliver to the assignee. The agent delivered the assignment to the assignee but refused to deliver the policy, falsely representing

that the company held it as security for premium notes of the insured. The assignee, by reason of his "full confidence in" the agent, did nothing further about the assignment of the policy for four and one half years and during that time did not notify the insured that he did not have possession of it nor give any notice to the company of his assignment. In the meantime, the agent, acting for the insured, procured a loan of money upon a note of the insured and as security for the note delivered to the money lender the policy together with an assignment to the payee of the insured's interest therein. The agent then died and, the facts becoming known to all the parties, the first assignee brought a suit in equity against the second assignee to gain possession of the policy. *Held*, that the first assignee by his voluntary action in leaving the policy in the possession of the agent for the insured was estopped to deny the validity of its delivery to the second assignee, and could have possession of it only upon paying to the second assignee the amount of his note with interest and costs of suit. In the same suit it appeared that, after the giving of the note to the second assignee, the agent procured a second loan from him for which he gave him a second note of the insured upon which, after it was signed, he had written without authority of the insured a statement that the same policy was to be held as security for it. *Held*, without deciding whether such interpolation upon the note destroyed its validity, that the second assignee had no right to hold the policy as security for the note.

BILL IN EQUITY, filed in the Superior Court on September 15, 1913, and afterwards amended, in which as amended the Connecticut Mutual Life Insurance Company, Harry R. Stanley, executor of the will of Sumner C. Stanley, and Bernhard Sommer were named defendants, and which contained the following allegations in substance:

In 1896 Sommer procured an ordinary policy of life insurance from the defendant company in the sum of \$10,000, payable in case of his death to his heirs, executors and assigns. At the date of the bill the policy had a cash surrender value of \$4,000. On February 11, 1909, for a valuable consideration Sommer assigned his interest in the policy to the plaintiff as collateral security for the indebtedness of Sommer to the plaintiff and others described in the instrument of assignment. One George E. Williams, who at the time of that assignment and until his death on July 28, 1913, was the general agent of the insurance company in Boston, drew the assignment and Sommer delivered it and the policy to Williams to be turned over to the plaintiff. Williams delivered the assignment to the plaintiff but did not deliver the policy, falsely asserting that the company held it as collateral security for premium notes payable to it. The company did not hold the policy and Sommer was in no way indebted to it. Williams held

the policy and on February 2, 1910, delivered it with what purported to be an assignment of Sommer's interest therein to the defendant Stanley, and Stanley claimed to hold it as security for a loan of \$4,000, refusing to deliver it to the plaintiff when he demanded it and secreting it so that it could not be reached by the plaintiff in an action of replevin. The plaintiff denied the validity of the assignment to Stanley. The company refused to recognize the plaintiff's rights to the policy, alleging that it was unable to determine who owned it. A quarter annual premium on the policy was overdue and there was danger that the policy would lapse for non-payment of premiums.

The fifth clause of the policy, which was annexed to the bill, contained the following provision as to assignments:

"That no assignment of this policy shall be valid unless made in writing, and a duplicate or certified copy thereof be filed at the office of said Company; and any claim against this Company, arising under this policy, made by an assignee or creditor, shall be subject to satisfactory proof of interest in the life insured, in due form, and to any breach of the conditions of this contract by any of the parties hereto, whether such breach exist prior or subsequent to any such assignment, and such proof of interest shall be a condition precedent to any right of action on this contract by or on behalf of such assignee; and this Company shall in no case be responsible for the validity of any assignment."

The prayers of the bill were for injunctions *pendente lite* preventing any acts which would obstruct the plaintiff from gaining possession of the policy at the termination of the suit, and for decrees declaring the plaintiff's right to possession of the policy and ordering its delivery to him.

The defendant Stanley demurred to the bill as amended on the grounds of want of equity, because the plaintiff had a complete and adequate remedy at law, and because the administrators of the estate of George E. Williams and those for whose benefit the assignment to the plaintiff was made were necessary parties.

The demurrer was overruled by *Pierce, J.*, and the defendant Stanley appealed.

The bill was taken *pro confesso* against Sommer. All other parties filed answers, issues were joined and the case was heard by *Jenney, J.* The judge made findings of fact substantially in

accordance with the allegations of the bill, and, in addition, found the following facts in substance:

Williams, acting for Sommer, had had several transactions with the defendant Stanley's testate and with Stanley and, on February 12, 1910, by reason of their dealings Sommer owed Stanley \$3,000. On that day, acting for Sommer, Williams gave to Stanley a note of Sommer's for that amount, with the policy in question in this suit and an assignment of Sommer's rights under the policy, including a power of attorney to Stanley to collect its proceeds in the name of Sommer.

On February 2, 1911, Stanley paid to Williams \$1,000 more, receiving therefor another note of Sommer dated that day. On this note, after it was signed by Sommer and without his authority, Williams wrote: "Conn Mut. Policy 215356 as security."

Williams died on August 1, 1913. The plaintiff notified the insurance company on October 5, 1913, of the assignment of the policy to him. He did not know of the assignment to Stanley until after the death of Williams.

Stanley notified the insurance company on August 23, 1913, of the assignment of the policy to him, and that he held it to secure both the notes of February 2, 1910, and of February 2, 1911.

"Stanley was ignorant of the assignment to Herman until after the death of Williams, and acted in good faith and without collusion with Williams. The policy has always been in his possession since the time it was handed to him in February, 1910. He has not been negligent in his dealings with reference to these assignments, unless it was negligent on his part to make these loans to Williams without ascertaining the true facts from Sommer. In these transactions Williams represented Sommer. The proceeds of both loans were given to Williams in checks payable to his order. Stanley had had many dealings with Williams in making loans upon policies insuring the lives of other persons, aggregating a very large amount. Williams paid him no bonus or commission on any loan."

Other material facts found by the judge are stated in the opinion.

The judge reported the case to this court for determination.

P. Rubenstein, for the plaintiff.

G. L. Mayberry, (*J. M. Hallowell* with him,) for the defendant, Harry R. Stanley, executor of the estate of Sumner C. Stanley.

SHELDON, J. 1. The defendant Stanley's demurrer to the bill was overruled rightly. The bill states a proper case for equitable relief. *Brigham v. Home Life Ins. Co.* 131 Mass. 319. *French v. Peters*, 177 Mass. 568, 573, 574. A somewhat similar bill was maintained in *Blinn v. Dame*, 207 Mass. 159.

2. The plaintiff by his assignment from Sommer acquired as against the latter a valid title to the policy of insurance which here is in question. As between the plaintiff and Sommer, it is immaterial that the assignment was not written upon or attached to the policy, that no reference to the assignment was written or noted on the policy, or that no notice of it was given to the insurance company, either in the manner required by the fifth clause of the policy or otherwise. *Merrill v. New England Mutual Life Ins. Co.* 103 Mass. 245, 252. *Hewins v. Baker*, 161 Mass. 320. *Atlantic Mutual Life Ins. Co. v. Gannon*, 179 Mass. 291. See also *Northwestern Mutual Life Ins. Co. v. Wright*, 153 Wis. 252; *Wood v. Phoenix Mutual Life Ins. Co.* 22 La. Ann. 617; *Manhattan Life Ins. Co. v. Cohen*, 139 So. W. Rep. 51; *Howe v. Hagan*, 97 N. Y. Supp. 86; *Cowdrey v. Vandenburg*, 101 U. S. 572; *Dunlevy v. New York Life Ins. Co.* 204 Fed. Rep. 670; *Fortescue v. Barnett*, 3 M. & K. 36. The contrary statements in *Palmer v. Merrill*, 6 Cush. 282, have not been followed. *James v. Newton*, 142 Mass. 366, 378. *Richardson v. White*, 167 Mass. 58, 60. The English rule, as stated in *Dearle v. Hall*, 3 Russ. 1, though adopted in many other jurisdictions, is not the law of this Commonwealth. *Thayer v. Daniels*, 113 Mass. 129, 131. *Putman v. Story*, 132 Mass. 205, 211.

It is true also, as the plaintiff has contended, that the owner of a chattel does not, by merely entrusting to a third person the custody or even the possession thereof, hold him out as its owner, and will not by that fact alone be estopped from setting up his title against even a *bona fide* purchaser from his bailee. *Rogers v. Dutton*, 182 Mass. 187, 189, and cases there cited. But we have here to do, not with a chattel, but with a non-negotiable chose in action, the right to receive in the future a certain sum of money upon the happening of certain contingencies. The policy of in-

surance merely shows the existence, nature and extent of the right. As has been correctly stated by counsel for Stanley, "it is the tangible evidence which the owner of the right possesses in order to show title to the right." The court must apply here the rule stated by the Chief Justice in *Baker v. Davie*, 211 Mass. 429, 440, "that when an owner has so acted as to mislead a third person into the honest belief that the one dealing with the property had a right to do so, he is estopped from showing the truth." The statement of Lord Herschell in *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, 215, quoted and followed by this court in *Gardner v. Beacon Trust Co.* 190 Mass. 27, 28, is to the same effect: "The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner." The same general principle (although its application in that case depended upon the existence of a custom) was stated again in *Baker v. Davie*, 211 Mass. 429, 436. See also *Washington v. First National Bank*, 147 Mich. 571; *Brocklesby v. Temperance Permanent Building Society*, [1895] A. C. 173, 181; *Farquharson Brothers & Co. v. King & Co.* [1901] 2 K. B. 697. See *Scollans v. Rollins*, 173 Mass. 275.

But this estoppel of a rightful owner to set up his title against a *bona fide* purchaser for value from one who had not the right to sell rests upon the conduct of the rightful owner. It arises against him when by his own conduct he has so clothed the wrongdoer with the *indicia* of ownership as to justify third persons in regarding the wrongdoer as either the rightful owner or as having authority from that owner. The estoppel arises only from the owner's voluntary action tending to produce and in fact producing that result. If this policy had been delivered to the plaintiff and then had been obtained from him by Sommer or Williams by means of a common law larceny, there would have been no foundation for an estoppel against the plaintiff, because, whatever

third persons might have thought or even might have been justified in thinking, the possession and apparent ownership would not have been put into Sommer or into Williams as Sommer's agent by any voluntary action of the plaintiff. *Bangor Electric Light & Power Co. v. Robinson*, 52 Fed. Rep. 520. *Farmers' Bank v. Diebold Safe & Lock Co.* 66 Ohio St. 367. This distinction was stated clearly by Holmes, C. J. in *Russell v. American Bell Telephone Co.* 180 Mass. 467, 469, *et seq.*, citing as typical cases *Knox v. Eden Musee Americain Co.* 148 N. Y. 441, and *Pennsylvania Railroad's appeal*, 86 Penn. St. 80. See also *Varney v. Curtis*, 213 Mass. 309, 312.

The rights of these parties depend upon the application of the principles which we have stated.

The plaintiff took his assignment by an instrument separate and apart from the policy itself. He allowed the possession of the policy to remain unaltered. It is true that he did this on the false representation that it was held by the insurance company as security for a premium loan; but the fact remains that it was his voluntary act. He took no other precaution, either by giving notice to the company or otherwise. He testified that he did not even tell Sommer that the policy had not been delivered to him. He trusted everything to Williams; and his own testimony was that he did this by reason of his "full confidence in Williams." He knowingly allowed the circumstances to be such as to indicate that Sommer retained the full ownership of the policy, and such that no inquiry of the company would disclose anything to the contrary or throw any doubt upon Sommer's title. For this reason, such cases as *Mente v. Townsend*, 68 Ark. 391, are not applicable here. The case is a stronger one than *Bridge v. Connecticut Mutual Life Ins. Co.* 152 Mass. 343, and the reasoning of that opinion is decisive against the plaintiff. There are no circumstances upon which any distinction can be made in his favor.

But the assignment to Stanley was not in reality, but only in form, an absolute one. It was given to secure an indebtedness of Sommer to Stanley. The plaintiff has a right to redeem from Stanley. This makes it necessary to determine the amount for which Stanley can hold the policy as against the plaintiff.

This policy was assigned to Stanley on February 2, 1910, to

secure a note for \$3,000. Afterwards Stanley lent to Sommer the further sum of \$1,000, and took from him a note for that amount, dated February 2, 1911, and signed by Sommer. Above Sommer's signature, Williams, without Sommer's knowledge or consent, wrote the words: "Conn. Mut. Policy 215356 as security." Those words described this policy.

We need not consider whether this interpolation by Williams in the note before its delivery to Stanley destroyed the validity of the note. R. L. c. 73, §§ 141, 142. *Stoddard v. Penniman*, 108 Mass. 366. *Draper v. Wood*, 112 Mass. 315. *Citizen's National Bank v. Richmond*, 121 Mass. 110. *Greenfield Savings Bank v. Stowell*, 123 Mass. 196. But we are clearly of opinion that it does not give to Stanley the right to hold the policy as security for the payment of this latter note. The assignment to him was to secure the payment of the note for \$3,000, not what further amounts might become due to him from Sommer. Sommer has never made or undertaken to make any further assignment to Stanley, or given or undertaken to give to Stanley any greater rights in the policy.

The other questions raised are disposed of by the findings of fact made in the Superior Court.

The plaintiff, if he so desires, may have a decree allowing him to redeem the policy upon payment of the amount due on Sommer's note for \$3,000, with interest and costs, within such time and upon such terms as may be determined by a judge of the Superior Court. If he shall not so redeem, his bill must be dismissed with costs.

So ordered.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY vs. BOSTON SOCIETY
OF NATURAL HISTORY & others.

SAME vs. SAME.

Suffolk. March 25, 1914. — May 25, 1914.

Present: HAMMOND, BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Equitable Restrictions. Massachusetts Institute of Technology. Boston Society of Natural History. Words, "Reserved from sale forever," "Condition."

The effect of the passage of St. 1861, c. 183, §§ 3, 4, 6, 7 and of the sales thereafter made by the Commonwealth of lots of land on Boylston, Clarendon and Newbury Streets in Boston facing the land held by the Massachusetts Institute of Technology under § 4 of that statute, was to create equitable restrictions for the benefit of the subsequent purchasers of those lots, subject to which the Commonwealth by St. 1903, c. 438, released to the Massachusetts Institute of Technology all rights which had been retained by the Commonwealth in the land held by that corporation under St. 1861, c. 183. Following *Wilson v. Massachusetts Institute of Technology*, 188 Mass. 565.

In the equitable restriction imposed by § 3 of St. 1861, c. 183, on the land designated for the use of the Massachusetts Institute of Technology, that it "shall be reserved from sale forever, and kept as an open space, or for the use of such educational institutions" as afterwards are mentioned, meaning as to two thirds of the tract of land described the Massachusetts Institute of Technology, it was not intended to prohibit the passing of a bare legal title, but to require that the land, if not used for the educational purposes of the corporation, should be kept as an open space.

The equitable restriction imposed by § 7 of St. 1861, c. 183, on the land designated for the use of the Massachusetts Institute of Technology, that the corporation shall not cover with its buildings more than one third of the area granted to it, does not require that the location of its buildings when once fixed to the satisfaction of the Governor and Council shall not be changed.

The equitable restrictions imposed by certain sections of St. 1861, c. 183, on the land designated for the use of the Massachusetts Institute of Technology were not imposed for the benefit of the Boston Society of Natural History, which was granted the use of adjoining land by § 5 of the same statute.

The land of the Massachusetts Institute of Technology abutting on Boylston, Clarendon and Newbury Streets in Boston is subject to equitable restrictions, in favor of the owners of lots on those streets opposite the open rectangle of land of which that corporation was granted the use of two thirds, that such two thirds of the rectangle shall forever be kept as an open space or for the use of the corporation for its educational and scientific purposes, and that, if and while so used, the corporation shall not cover with its buildings more than one third part of the area of the land designated for its use.

PETITION, filed in the Land Court on February 8, 1912, by the Massachusetts Institute of Technology, incorporated by St.

1861, c. 183, against the Boston Society of Natural History, incorporated by St. 1830, c. 56, amended by St. 1861, c. 183, § 5, and others, for the registration of the title of the petitioner to the westerly two thirds portion of the rectangular tract of land in Boston bounded by Berkeley, Newbury, Clarendon and Boylston Streets, held by the petitioner under St. 1861, c. 183, and St. 1903, c. 438; and also a

PETITION, filed in the Land Court on April 17, 1913, by the same corporation under R. L. c. 182, §§ 11-14, as amended by St. 1904, c. 448, against the same respondents to determine the validity, nature and extent of certain alleged easements claimed in the land of the petitioner described in the first petition.

In the Land Court the cases were tried together before *Davis, J.*, who at the request of the various parties reported them for determination by this court. A statement of the facts on which the decision of this court in *Wilson v. Massachusetts Institute of Technology*, 188 Mass. 565, was based, taken from the opinion of the court, will be found on pages 566-579 of 188 Mass.

J. B. Warner, (*R. W. Hill* with him,) for the petitioner.

John Chipman Gray & Roland Gray, for the respondent *H. W. Suter* and others.

H. M. Davis, (*C. S. Rackemann* with him,) for the respondent *Lorin F. Deland*.

H. Wheeler, for the respondent *Trinity Church*.

E. H. Talbot, for the respondent *George R. White* and others, submitted a brief.

SHELDON, J. We regard it as settled by the decision of this court in *Wilson v. Massachusetts Institute of Technology*, 188 Mass. 565, that the effect of the passage of St. 1861, c. 183, and of the sales thereafter made by the Commonwealth of the lots of land upon Boylston, Clarendon and Newbury Streets facing the square described in that act, was to create equitable easements or restrictions upon the land included in that square for the benefit of the subsequent purchasers of those lots. As to some of those lots, and as to one of those equitable easements or restrictions, it is conceded that the question has been concluded by the decision in the *Wilson* case. We need not consider what further effect, if any, should be given to that decision as an adjudication; for we are satisfied with the reasoning of the opinion

which was rendered therein. The result reached, in our opinion, was in accord with the great weight of authority both in this Commonwealth and in other jurisdictions. We refer to some of the cases not cited in that opinion. *Schworer v. Boylston Market Association*, 99 Mass. 285, 297, 298. *Beals v. Case*, 138 Mass. 138, 140. *Codman v. Bradley*, 201 Mass. 361. *Childs v. Boston & Maine Railroad*, 213 Mass. 91. *Pierce v. Roberts*, 57 Conn. 31. *Hills v. Miller*, 3 Paige, 254. *Lennig v. Ocean City Association*, 14 Stew. 606. *Bridgewater v. Ocean City Railroad*, 17 Dick. 276. *Rowan v. Portland*, 8 B. Mon. 232. *Alderson v. Cutting*, 163 Cal. 503. *Rankin v. Huskisson*, 4 Sim. 13. *McLean v. McKay*, L. R. 5 P. C. 327. *In re Birmingham & District Land Co.* [1893] 1 Ch. 342. *Rowell v. Satchell*, [1903] 2 Ch. 212.

The act of 1861, as was pointed out in the *Wilson* case, operated not only as a statute strictly so called, but also as a legislative grant and declaration, like a declaration of trust, for the establishment of stated rights in those who should become the owners of the forty-six lots facing upon the square. *Commissioners on Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446, 448. *Attorney General v. Gardiner*, 117 Mass. 492, 499. *Bradford v. McQuesten*, 182 Mass. 80. *Wisconsin Central Railroad v. Forsythe*, 159 U. S. 46, 55. As such, it became binding in favor of the purchasers of those lots when, acting, as it must be assumed (*Beals v. Case*, 138 Mass. 138, 142), and indeed as it appears that they did, on the faith of this declaration by the Commonwealth and paying an increased price by reason thereof, they made their purchases. As to them, the Commonwealth became bound in equity by reason of its grant or declaration, just as a private person would have been. *Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray, 339, 350. *Boston v. Richardson*, 13 Allen, 146, 156. *Boston Molasses Co. v. Commonwealth*, 193 Mass. 387, 389. The act did not attempt to bargain away or to infringe upon the future exercise of any sovereign rights, and cases which deal with such a state of facts have no application here. See for example *Newton v. Commissioners*, 100 U. S. 548; *Fox v. Cincinnati*, 104 U. S. 783; *Vicksburg, Shreveport & Pacific Railroad v. Dennis*, 116 U. S. 665; *Wisconsin & Michigan Railway v. Powers*, 191 U. S. 379.

It is manifest also that this act was intended to create per-

manent restrictions and not merely temporary ones, and this makes immaterial other cases relied on by the petitioner, such as *Hubbell v. Warren*, 8 Allen, 173; *Boston Baptist Social Union v. Boston University*, 183 Mass. 202; and *Welch v. Austin*, 187 Mass. 256. Since the act itself operates as a grant or a declaration of trust, it was not a merely verbal statement or one of which sufficient notice was not brought home to the parties, and other cases relied on by the petitioner are inapplicable, such as *Sprague v. Kimball*, 213 Mass. 380, and *Renals v. Cowlishaw*, 9 Ch. D. 125. There was a general scheme here for the development of the surrounding land, and this excludes such cases as *Wille v. St. John*, [1910] 1 Ch. 325. But we need not consider all the specific objections that have been suggested. We have weighed carefully all the contentions made in behalf of the petitioner, and have examined all the decisions to which we have been referred, as if the question were a new one. We are still content to adopt the reasoning of the *Wilson* case, *ubi supra*, and to follow it as an authority.

But it is said that this ought not to be done, because, by consent of the parties in the *Wilson* case, incompetent evidence there was considered. We are not prepared to say that all of this evidence was incompetent for all purposes. It doubtless is true that the rights of the owners of these lots depend upon the intention of the Legislature as displayed in the statute itself. *Commonwealth v. Fitchburg Railroad*, 8 Cush. 240. *Boston & Providence Railroad v. Midland Railroad*, 1 Gray, 340. *Boston v. Talbot*, 206 Mass. 82. *North British Railway v. Tod*, 12 Cl. & Fin. 722. But this act operated, not only as a statute, but as an instrument creating rights in others; and it is competent to show the circumstances as they then existed. *Browne v. Turner*, 174 Mass. 150, 159. *Old South Association v. Boston*, 212 Mass. 299, 304. *Rea v. Aldermen of Everett*, 217 Mass. 427. See also *Beals v. Case*, 138 Mass. 138; *Commonwealth v. Dow*, 217 Mass. 473; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 462, *et seq.* The plans, deeds, catalogues of sales, etc., were not admissible to show the intention of the Legislature in the passage of the act. They could have no further effect than to identify the persons who became entitled to the benefit of the restrictions. The petitioner asked for a ruling to this effect, and it was given. The rul-

ings made on this point by the judge of the Land Court were sufficiently favorable to the petitioner.

Nor does it appear that the decision in the Wilson case was made upon incompetent evidence. The court expressly declared that the existence of the restrictions depended upon the intention shown by the act, and that if such an intention was not found in the act itself, the restrictions could not arise from what later was done by the officers of the Commonwealth.

One of the restrictions was that the square should be "reserved from sale forever." And this was recognized in the Wilson case (page 583) as being one of the restrictions to which the petitioner's land was subjected. But its effect was not considered, and now must be determined.

It is true that this restriction would be invalid if made by an individual. It is not so clear that the Commonwealth, acting both as an owner of land and in its sovereign capacity, could not create such a restriction. *Smythe v. Henry*, 41 Fed. Rep. 705. But this restriction must be taken in connection with all the other provisions of the act in which it is found, and construed so as to carry out the evident intent of the Legislature rather than by a close adherence to its exact words. The provision is not barely that the land shall be reserved from sale forever, but that it shall be so reserved and "kept as an open space, or for the use of such educational institutions" as are afterwards mentioned. The manifest intention was to prohibit any sale which should interfere with the main object of the act, the object which the subsequent purchasers of the other lots were to pay for, that the square should be kept as an open space or used solely in the other manner stated. It was not intended to prohibit the passing of a bare legal title, but only such a sale as should avoid or endanger the main purpose which was declared. This was the construction adopted in *McLean v. McKay*, L. R. 5 P. C. 327. That bare legal title, so far as it still was held by the Commonwealth, has been released to the petitioner by St. 1903, c. 438, but subject to the legal rights of all other parties and to certain additional restrictions. We are of opinion accordingly that the land is not now subject to the restriction that the mere legal title shall not be sold or transferred, but only to the other restrictions created by St. 1861, c. 183.

The first one of these restrictions is in the alternative, that the land shall be kept as an open space or for the use of such educational institutions as are mentioned. And in view of the other provisions of the statute and of what has been done and the rights which have been acquired thereunder, we are of opinion that these educational institutions can be only the petitioner as to the westerly two third parts of the land. It follows that the petitioner's land, if not used for its educational purposes, is subject to the restriction that it must be kept as an open space. If it shall continue so to be used by the petitioner, it is subject to the further restriction that the petitioner shall not cover with its buildings more than one third of the area of the land.

The respondents contend further that the present location of the buildings upon this land cannot be changed. The design and construction of these buildings and the arrangement of the grounds were subject to the approval of the Governor and Council, and their approval has been given. The Governor and Council acted in this matter according to their own discretion, but without the power to abridge the right of the lot owners either to have the land kept as an open space or (if used by the petitioner in the manner permitted) to have the land covered by buildings only as to one third of its area. *Wilson v. Massachusetts Institute of Technology*, 188 Mass. pp. 584, 585. The respondents contend that this location of the buildings is like the location of an undefined way, which, when once duly fixed, is not to be changed at the mere will of one party; and there is force in the argument.

But this is not an easement under which something is to be done by the owners of the dominant estates upon the land of the petitioner. It is a limitation, in favor of those other estates, upon the power of the petitioner to put to a beneficial use a portion of its land, not including any particular and specified part thereof, but defined only by its amount. The petitioner is allowed to occupy with buildings only one third of the area of its land; two thirds thereof must remain open. There is no question that in the first instance (subject to whatever control was given to the Governor and Council) it was for the petitioner, acting in good faith, to select the ground upon which it should build. To say that this selection once made must be forever after binding would be to add to the restriction by judicial interpretation something which the

Legislature did not see fit to add. It would be to make the restriction more onerous than in terms it was made by the instrument which created it. But a restriction like this always is to be construed with some strictness, and not extended beyond the natural meaning of the words used in its creation. *American Unitarian Association v. Minot*, 185 Mass. 589, 595, and cases there cited. The words must not be so construed as to enlarge by inference or implication the restrictions imposed.

The requirement of § 4 of St. 1861, c. 183, that the petitioner should within a stated time "erect and complete a building suitable for its said purposes, appropriately inclose, adorn and cultivate the open ground around said building, and shall thereafter keep said grounds and building in a sightly condition," tends to support our view. It manifestly was not required or contemplated that this building should occupy the whole third part of the area, upon which the petitioner could erect buildings. The provisions of § 6 show that it was intended to give to the petitioner the privilege of erecting additional buildings, of course within the limitation fixed by § 7 of the act. When such additional buildings or increased accommodation should be required for the proper purposes of the petitioner, how can we say that the building already erected in compliance with the requirement of § 4 might not be taken down, and either new buildings in convenient locations or one larger building, covering the whole allowed space, be put up, though the location of the original building were left in this way as an open space? But if we cannot say this, and if the location of one building at least was not fixed forever by the selection once made of its site, we have no right to extend the restriction actually imposed by saying that the location of any other buildings should be less revocable and less subject to change than that of the one first erected in compliance with the terms of the act.

The other provisions of the act point in the same direction. Its language was very carefully chosen. The provision for the design and construction of the buildings to be erected by the petitioner is not expressed in words like those which created the restrictions that heretofore have been considered. The requirements now spoken of are stated as conditions, and are to be enforced, not by equitable remedies, but by the creation of a right of re-entry by the Commonwealth, a right which would

or would not be exercised by the Commonwealth according to its own discretion, and which now has been released to the petitioner by St. 1903, c. 438. It is not that the word "condition" could not be used to create an equitable easement or restriction, if such was the intention manifested. We have a very careful and exact use of language, apt as to other provisions to create restrictions, but here expressly providing for conditions, with the appropriate remedy for a breach thereof. The creation of restrictions under a scheme for the development of land depends always upon the intent shown by the language used as applied to the existing circumstances. *Hartman v. Wells*, 257 Ill. 167. It does not appear to have been the intention of the Legislature to restrict the right of the petitioner, while it continued to occupy the land, by the requirement in favor of the adjoining lot owners that the location of its buildings, once fixed to the satisfaction of the Governor and Council, should not afterwards be changed.

If it appeared, which we do not decide, that the circumstances of this neighborhood had become so changed, that the restrictions upon this land ought not to be enforced specifically, yet that would not deprive them of existence, but would merely make them the subject of pecuniary compensation. See *Jackson v. Stevenson*, 156 Mass. 496; *American Unitarian Association v. Minot*, 185 Mass. 589; *Welch v. Austin*, 187 Mass. 256, 261.

We are not impressed by the argument of the petitioner that equitable easements or restrictions were not introduced into our law until the decision in 1863 of *Parker v. Nightingale*, 6 Allen, 341, and that therefore their creation in 1861 could not have been intended by the Legislature. *Hamlen v. Keith*, 171 Mass. 77. The reasoning of the opinion in *Whitney v. Union Railway*, 11 Gray, 359, decided in January, 1860, is against the proposition. And in *Parker v. Nightingale*, *ubi supra*, the doctrine in question was applied to a conveyance made in 1822. The decision in *Wilson v. Massachusetts Institute of Technology*, 188 Mass. 565, is decisive against this contention of the petitioner.

These restrictions appear to have been intended for the benefit of the owners of the lots abutting on Boylston, Clarendon and Newbury Streets and facing the square in question. They were not intended for the benefit of the lots fronting on Berkeley Street, which had been sold before the passage of the act. It is

settled that they created no restrictions in favor of that portion of the square which was assigned to the Boston Society of Natural History. *Boston Society of Natural History v. Massachusetts Institute of Technology*, decided without opinion on January 1, 1906.* And we find no intention shown in the act that it should operate for the benefit of any lots, however near to the square, not actually opposite to some part of it. The scope of the act is limited in this way; and there is no rule of law which can prevent us from giving effect to the intent thus shown. *Boston Water Power Co. v. Boston*, 127 Mass. 374. *Coolidge v. Dexter*, 129 Mass. 167, 169. *Williams v. Boston Water Power Co.* 134 Mass. 406. *Regan v. Boston Gas Light Co.* 137 Mass. 37. *Pearson v. Allen*, 151 Mass. 79. It follows that the rectory lot so called of Trinity Church is, but that the chapel lot so called, is not, entitled to the benefit of the restrictions.

It is not necessary to discuss in detail the different exceptions taken by the respective parties in the Land Court. So far as material, they are sufficiently covered by what has been said.

The result is that in the second case a decree is to be entered that the petitioner's estate is subject to the equitable easements or restrictions, in favor of the owners of the lots abutting on Boylston, Clarendon and Newbury Streets and opposite to the square in question, that it shall forever be kept as an open space or for the use of the petitioner for its educational and scientific purposes, and if and while so used that the petitioner shall not cover with its buildings more than one third part of the area of its land.

In the first case, a decree is to be entered for the registration of the petitioner's title subject to the incumbrances above stated.

So ordered.

* The rescript declared that a majority of the court were of opinion that the restrictions upon the defendant's land were not imposed for the benefit of the plaintiff.

NEW ENGLAND CEMENT GUN COMPANY *vs.* EDWARD J. MCGIVERN
& others.

Suffolk. January 26, 1914. — May 26, 1914.

Present: RUGG, C. J., LORING, SHELDON, DE COURCY, & CROSBY, JJ.

Labor Union. Unlawful Interference. Damages, In suit in equity.

If, in a suit in equity by a corporation, which was the exclusive licensee in a certain territory authorized to operate a machine for projecting through a hose a mixture of cement, sand and water called "gunite" upon walls, against the officers of a labor union, organized to unite all practical journeymen plasterers working within its locality "for the purpose of securing united action in whatever may be regarded as beneficial to their united interest," it appears that the defendants, in order to compel the plaintiff to employ only union men for operating the hose and "truing up" the work on all jobs where it used the machine, conspired together for the purpose of creating and enforcing a boycott against the plaintiff and of hindering and interfering with the prosecution of its business unless it should accede to their demands, sought out persons proposing to make contracts with it and coerced them into not doing so, caused the rescission of such contracts as they discovered had been made with the plaintiff, and, by means of a strike, compelled a certain contractor in charge of the plastering of a certain building, with whom they had no trade dispute, to compel the general contractor to compel the owner to compel the plaintiff to give them the work they demanded, an injunction will be issued restraining the defendants from causing or taking part in any boycott against the plaintiff's business by coercing others, through intimidation or threats, to withdraw from the plaintiff their beneficial business intercourse, and from causing or inciting any sympathetic strike against the plaintiff or its customers for the purpose of preventing the use by the plaintiff of its machinery and process of applying gunite or for the purpose of compelling it to discharge any of its non-union workmen.

In the same suit, a master found that, because of the acts of the defendants and in response to a letter from the owner of the building, the plaintiff assented to a cancellation of its contract, and that, "as a practical matter it was impossible for the plaintiff to hold its contract and impossible for the owner to allow the plaintiff to perform it, and the result of the action of the defendants was to destroy its value," and he further found that the profit which the plaintiff would have made if allowed to perform the contract was \$890. The case being reserved for determination by this court, it was held, that, while the plaintiff was entitled to damages caused to its business by the unlawful acts of the defendants, the findings of the master were not sufficient to warrant an assessment of damages without a further hearing.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 29, 1913, against "Edward J. McGivern . . . individually and as

an officer and member of a voluntary unincorporated association, to wit, The Operative Plasterers' International Association of the United States and Canada; and William C. Cumming, William J. Taylor, William C. Keating, and said Edward J. McGivern, individually and as officers and members of a voluntary unincorporated association, to wit, Union No. 10, Boston Branch, Operative Plasterers' International Association of the United States and Canada, and all other members of said Union No. 10, Boston Branch, most of whom are to the plaintiff unknown, and who are too numerous to be individually named as defendants in these proceedings." The bill sought to enjoin the defendants from interfering unlawfully with the plaintiff's business and for damages.

The suit was referred to Clarence H. Cooper, Esquire, as master. The material facts found by him are stated in the opinion. The case was reserved by *Sheldon, J.*, for determination by the full court.

W. M. Noble, for the plaintiff.

E. F. McClellenn, (*A. L. Fish* with him,) for the defendants.

DE COURCY, J. No exceptions were taken to the report of the master; and among the facts found by him are the following: The plaintiff is the exclusive licensee in New England of certain patented machinery and processes by which sand, cement and water are simultaneously mixed and projected upon the walls of buildings and other structures. The apparatus, which is called a cement gun, consists of a portable metal barrel with chambers and valves, in which dry cement and sand are mixed, divided into units of quantity, and then by means of an air compressor driven out of the gun and through a hose to the nozzle. A second hose conveys water into a chamber of this nozzle, and the elements are converted into a mixture or plaster called gunite, which is instantly ejected from the nozzle upon the surface to be covered. The apparatus is operated by two men, the gun man and the nozzle man. The gun man controls the valves which regulate the flow of the mixture into and through the gun, the pressure of air within the chambers, and the rate of discharge of the mixture from the gun and through the hose to the nozzle. The nozzle man holds and operates the nozzle, has charge of the hose and controls the flow of the water. He must be skilled in determining the angle

at which the plaster shall strike the surface; in judging and regulating the consistency, with respect to moisture, of the plaster which is being projected from the nozzle; and in determining the thickness and evenness of the coat of plaster which he is laying.

In a majority of cases it is necessary for the plaintiff to employ a skilled plasterer to follow the work of the gun and "true up" the surface of the cement. Operating the nozzle is very hard work, and it is the plaintiff's practice to have the nozzle man and the gun man interchange in their work at the end of each half day, for the purpose of resting each other; but if the nozzle man is a plasterer, then when the plasterer "truing up" the surface has learned the duties of nozzle man, the two plasterers can exchange places with the same result.

The defendants Cumming, Taylor and Keating are members of and respectively president, business agent and secretary of the Journeymen Plasterers' Benevolent Union of Boston, Mass., No. 10 of the International Association. McGivern is a member of the local union, and also president of the parent body, the Operative Plasterers' International Association of the United States and Canada, by which the local organization was chartered. The object of the local union, as defined in its constitution, is "to unite together all the practical journeymen plasterers working within the jurisdiction of this union for the purpose of securing united action in whatever may be regarded as beneficial to their united interest." And the master specifically finds that "one of the main objects of the International Association and of Union No. 10 is to exercise a control by concerted action over the relations of practical plasterers and those who may, from time to time, require their services."

In the autumn of 1912, the plaintiff was plastering with its process the exterior of an apartment house in Boston, when the defendant McGivern told the plaintiff's superintendent that he would have to employ union plasterers to operate the nozzle, or he (McGivern) would call a strike of the men working on the building; and for a time a union plasterer was so employed. On February 28, 1913, the plaintiff executed a written contract with the Old Colony Real Estate Trust to coat with gunite the exterior walls of a building which the Trust was erecting on Somerset and Howard Streets in Boston. While the preliminary

negotiations were going on the defendant Taylor asked the plaintiff's vice-president, one Ambursen, if the plaintiff was going to employ union men on the job, and on being answered in the negative, told him that if the plaintiff did the outside work on the building it would have to do the inside work also. About this time Taylor called on one Farley, who was the acting trustee for the Old Colony Real Estate Trust, and said to him: "I understand you have got a contract with the New England Cement Gun Company. I would advise you not to go ahead and put that gunite on the building; if you do, there is liable to be trouble."

Early in April, when the interior plastering on the building in question was about one third done, the plasterers, all of whom were members of Union No. 10, left their work, and Taylor stated to Farley, that unless he cancelled his contract with the plaintiff the plasterers would not return to their work. In order to induce them to return Farley, at Taylor's suggestion, wrote to one Caddigan, who was the general contractor on the building, notifying him that only union men should be employed in the work of covering the building with cement; and on the letter being given by Caddigan to Taylor the plasterers returned to work. A week later the union plasterers again left their work, and returned upon the assurance of Farley that none but union men would be employed on the outside of the building. Becoming suspicious of Farley's intentions, the union plasterers left their work a third time about ten days afterwards, the lathers and metal workers also leaving, and McGivern and Taylor refused to allow the plasterers to return to work until a contract had been made and exhibited to them, by which the builder had arranged for this outside work with Monahan, who had the contract for the inside plastering, and would employ union labor. Shortly before this the plaintiff's letter, later referred to, releasing the owner from its contract, had been sent to Farley, and by him shown to McGivern and Taylor.

It appears that Taylor, the business agent, was accustomed to make reports orally at the meetings of the Union. Their records, under date of April 16, 1913, contain the following: "B. A. made a report and the same was accepted as progressive. Moved no work be done on Monahan's job until the outside is started satisfactory to the business agent."

It does not appear that there is any dispute or contention between the plaintiff and its own employees, or that these employees are taking any part in the action of the defendants. The plaintiff's officers do not intentionally discriminate between union and non-union workmen, and were willing that their employees should join the defendant union. But, as the defendant McGivern informed them, this could not be done because the men were not plasterers; and he knew of no union to which they were eligible.

The master made certain specific findings and conclusions, among which are these.

"4. That there is a division of sentiment among members of the unions as to the use of the cement gun and process, the defendant McGivern and others being in favor of its use, and others in the majority being hostile to its use, based upon the fear that it will reduce the work of practical plasterers; that the present attitude of the local union officials is that the union should control the operation of the nozzle of the gun, and not the rest of the machinery; that the demand of the defendants is that the plaintiff employ skilled plasterers only, who are members of the union, to operate the nozzle, as well as to follow after the nozzle in smoothing the surface covered; that the object of the defendants is to compel the plaintiff to unionize its business and to run a closed shop so far as the work of plastering goes, in order to secure all of that work for the members of their union under union conditions; and that it was to accomplish this object that the strikes were called on the job upon the Howard Street building.

"5. That the defendants have conspired together for the purpose of creating and enforcing a boycott against the plaintiff and of hindering and interfering with the prosecution of its business and of injuring the same unless it accedes to their demands.

"6. That the defendants, in pursuance of said conspiracy, are engaged in watching and seeking out work proposed to be given to the plaintiff and in coercing those in control thereof not to make with the plaintiff any contract for such work, and in causing the rescission of such contracts as they discover to have been made with the plaintiff."

"8. That the strikes were strikes against a subcontractor for

the purpose of forcing him to coerce the main contractor to coerce the owner of the building to coerce the plaintiff to yield to the demands of the union.

"9. That the defendants have instituted a boycott against the plaintiff and intend to continue enforcing the same, unless prevented from so doing."

Without further recital of the details, it is apparent that the record discloses a combination on the part of the defendants to do acts which the law does not justify, notwithstanding that the ultimate motive by which they were inspired was to advance their own interests. The plaintiff had a written agreement with the owners of the building to apply the coating of gunite. Under our decisions it was unlawful for the defendants, by means of strikes and otherwise, intentionally to induce the owners to take away from the plaintiff its rights under that agreement. Such conduct is not legally allowable as so called trade competition or defense of self-interest. A combination to procure a breach of contract is an unlawful conspiracy at common law. *Berry v. Donovan*, 188 Mass. 353. *Folsom v. Lewis*, 208 Mass. 336. Further, if Monahan, who had the subcontract to do the interior plastering, also had the contract for this exterior work, his union workmen, unless prevented by their contract of employment, might have gone out on a strike unless he agreed to give all of the plastering work to them or their associates; because we assume that the application of stucco or cement to the exterior of a building may be found to be work such as practical plasterers have a right to compete for. But it was not lawful for them to strike to compel Monahan, with whom they had no trade dispute, to compel the general contractor to compel the owner to compel the plaintiff to give to the defendants the work they demanded. In other words, it was an unjustifiable interference with the plaintiff's business to injure others in order to compel them to coerce the plaintiff. Martin, *Modern Law of Labor Unions*, § 77 and cases cited. The acts of coercion and procuring breaches of contract mentioned in the sixth finding plainly are not justified by the law of this Commonwealth. It is unnecessary to consider further the unlawfulness of such a secondary or compound boycott in view of the full discussion of the subject in the recent opinions of this court in *Pickett v. Walsh*, 192 Mass. 572, and *Burnham v.*

Dowd, 217 Mass. 351, in which cases are collected the authorities in this and other jurisdictions.

The master finds that the International Association has not taken any action with respect to the use of the cement gun, and was not in any way concerned with the strikes referred to; and that the defendants McGivern and Taylor acted throughout as the agents and representatives of Union No. 10.

The plaintiff is entitled to a decree enjoining the defendants from causing or taking part in any boycott against the plaintiff's business, by coercing others, through intimidation or threats, to withdraw from the plaintiff their beneficial business intercourse; and from causing or inciting any sympathetic strike against the plaintiff or its customers for the purpose of preventing the use by the plaintiff of its machinery or process for applying gunite, or for the purpose of compelling it to discharge any of its non-union workmen; and to costs of suit.

As to damages. The only sum stated by the master is \$890, which is the profit the plaintiff would have made if allowed to perform its contract with the Old Colony Real Estate Trust. It appears from the report that the plaintiff, in response to a letter from that Trust requesting a cancellation of the contract on account of the labor trouble, on April 9 wrote its assent thereto. As was said by Haney, J., in *Chipley v. Atkinson*, 23 Fla. 206, 220: "My own termination of a contract, whether with or against the will of my employer, cannot constitute a breach of it by him or create a ground of action against him, or one who has unsuccessfully endeavored to induce him to break it." But while the plaintiff has precluded itself from recovering damages for the breach of the contract as such, it may recover the damages caused to its business by the unlawful acts of the defendants. And in determining the amount to which it may be entitled the master may take into account, as stated in his seventh specific finding,*

* The seventh specific finding was as follows: "7. That the plaintiff, by practical force of circumstances caused by the acts of the defendants, was obliged to cancel its contract with the Old Colony Real Estate Trust; that the work upon the building could not have been carried forward any further until the plaintiff's contract was cancelled and a contract made with another person; and that, as a practical matter, it was impossible for the plaintiff to hold its contract and impossible for the owner to allow the plaintiff to perform it, and the result of the action of the defendants was to destroy its value."

that "as a practical matter, it was impossible for the plaintiff to hold its contract and impossible for the owner to allow the plaintiff to perform it, and the result of the action of the defendants was to destroy its value." It is to be borne in mind also that at the time of the correspondence referred to there was an understanding between the officers of the plaintiff and defendant companies that, if matters could be so adjusted that the work on the interior of the building would not be further interfered with, the contract for the exterior plastering would be re-awarded to the plaintiff. As the report now stands the court is not in a position to assess the damages, and the case must be recommitted for that purpose unless the plaintiff shall waive its claim therefor.

Ordered accordingly.

LYMAN B. BROOKS COMPANY vs. GEORGE L. WILSON.

Suffolk. February 25, 1914. — May 26, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Evidence, Extrinsic affecting writings, Entries in books of account. *Contract*, In writing.

In an action to recover the price of certain printed blanks alleged to have been printed for the plaintiff by the defendant, it appeared that the defendant was an attorney at law and he contended that he had ordered the blanks in behalf of a client and that he was not liable therefor. It appeared that the defendant had filled in and signed an order blank for the plaintiff, describing the blanks ordered, he having written after the word "Collect," the figures "\$92," after the letters "C.O.D." the word "Yes," and having signed his name after the words, "Ordered by." At the trial the defendant testified without objection that, before signing the order, in a telephone conversation he stated to the plaintiff his client's financial standing and that the plaintiff "must not look to him for payment of the bill, and that if the plaintiff took the order he must take it with that understanding." The judge ruled that the order was a contract signed by the defendant which bound him personally, and that the plaintiff could not discharge himself from liability by parol evidence. *Held*, that the judge's ruling was wrong because, the order containing no promise to pay but ending with the words "Ordered by," followed by the defendant's name, might be found not to contain the entire contract as to the transaction, so that the verbal arrangement might be shown in evidence and be given its full effect.

Since St. 1913, c. 288, providing that "an entry in an account kept in a book . . . shall not be inadmissible in any civil proceeding as evidence of the facts therein

stated because . . . it is hearsay or self-serving, if the court finds that the entry was made in good faith in the regular course of business and before the beginning of the civil proceeding aforesaid," a judge, before whom is being tried an action of contract for goods sold in which the defendant, an attorney at law, contends that his client and not he had contracted for the goods, properly may admit in evidence, after he has made the necessary findings as to the good faith and time of the entry, an entry in the plaintiff's book of account in which he had charged the goods to the defendant.

LORING, J. This is an action against an attorney at law to recover the price due to the plaintiff for one thousand steel stock certificate blanks of the Eastern Coal Company, a Massachusetts corporation.

It appeared at the trial that the defendant had signed the order, a copy of which is set forth below.* He there testified without objection that before this order was signed he had a talk over the telephone with the plaintiff's treasurer or manager, in which he

* The words in *italics* were written. The other words were the words of the plaintiff's printed blank.

"Please Fill Out Order and Write Plainly.

LYMAN B. BROOKS COMPANY,
Bank Check Manufacturers and Lithographers.

151 Franklin St.,	References;	{	Bradstreets
Boston			Beacon Trust Co.

Please furnish 1000 Steel Stock Certificates, Style No. Vol. 4 Incorporated under the laws of the State of *Massachusetts*

Name of Corporation *Eastern Coal Company*

Do Not write CO. if you want COMPANY Is "THE" part of the title?

Capital stock *\$325000.00*

Amount of Preferred Stock *\$250000* Amount of Common Stock *\$75000*

Shall preferred clauses print on Common Certificates? *No.*

Par Value of Shares *\$100.00.* Full paid and Non-Assessable? *Yes*

Commence Preferred Stock No. *P 1* Commence Common Stock No. —

State what Officers sign Certificate; *Pres & Treas.*

What City (if wanted)

Stock Ledger and Record Book.

Transfer Book — Receipts

Ship by

Express

If Seal is wanted write copy of same.

Deposit \$	Collect <i>\$92.00</i>	C. O. D.	<i>Yes.</i>
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Ordered by	<i>Geo. L. Wilson</i>
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Dated April 20, 1912. Address *15 State Street*

Ent 4/20/12 ≠379"

told the treasurer or manager about the financial standing of the Eastern Coal Company "and stated that the plaintiff must not look to him for payment of the bill, and that if they took the order they must take it with that understanding. . . . It was undisputed that the second lot of stock certificates (being the lot for the price of which the suit was brought) was sent to the defendant's office C.O.D. and that the defendant told the messenger to take the certificates back and keep them until the plaintiff got its money; and that thereafter the plaintiff voluntarily sent said certificates to the defendant's office and that they were received there in his absence and without his knowledge, and that they remained there in the same wrappings as when delivered, and had never been opened or used."

It further appeared in evidence that "this order was a printed form customarily used by the plaintiff, and when presented to the defendant all parts of the same except such as are underlined in the annexed copy were printed; and the figures '\$92.00' after the word 'collect,' and the word 'yes' after the letters C.O.D. had been filled in by the plaintiff."

The judge* ruled "that this [order] was a contract signed by the defendant and which bound him personally and that they [he] cannot by parol evidence discharge himself from the liability — although there was a principal behind him."

The case is here on an exception to that ruling.

If the plaintiff's order blank had included the words "To be paid for," as well as "Ordered by," there would have been no question as to the correctness of the ruling. In that case the order would have been a reduction into writing of the whole agreement made. Where the defendant in terms agrees to pay he cannot show by parol evidence that he did not agree to pay. In *Simonds v. Heard*, 23 Pick. 120, and *Brown v. Bradlee*, 156 Mass. 28, (where it was held that the vendor could hold either the agent or the principal,) there were express words of promise in the writing signed by the agent. In such cases "The doctrine proceeds on the ground that the principal and agent may each be bound; the agent, because by his contract and promise he has expressly bound himself; and the principal, because it was a

* *Bell, J.*

contract made by his authority for his account." Shaw, C. J., in *Huntington v. Knox*, 7 Cush. 371, 374.

But if the defendant is to be believed, the case presented here is one where it was orally agreed between the plaintiff and the defendant that if the order in question was given, it was to be given by him as agent of the Eastern Coal Company, and that it was to be taken by the plaintiff as the order of the coal company on which the coal company alone was to be liable; and where, after that arrangement had been agreed upon by word of mouth, the plaintiff, pursuant to that oral agreement, presented to the defendant one of its order blanks to be filled in by the defendant (who was the agent) which did not contain any promise to pay but ended with the words "Ordered by." It is a case where the whole contract is not reduced to writing, but where a written order not undertaking to deal with the whole contract is given pursuant to an oral arrangement. It is settled that in such a case the oral arrangement can be shown in evidence. *Juilliard v. Chaffee*, 92 N. Y. 529. *Neal v. Flint*, 88 Maine, 72. *The Poconoket*, 70 Fed. Rep. 640. *Tufts v. Hunter*, 63 Minn. 464. *Babcock v. Deford*, 14 Kans. 408. The case at bar is particularly like *Bradstreet v. Rich*, 72 Maine, 233, where (as in the case at bar) the promise relied on was an implied as distinguished from an express promise. It was there said that in such a case the express promise made by parole could be shown in evidence. One of the terms orally agreed upon was as to the person who was to be liable for payment if the order was given. The written order does not deal with that term of the proposed trade. It seems to have been assumed in *Isham v. Burgett*, 157 Mass. 546, that the order there in question was not a reduction into writing of the whole contract, excluding evidence of the parol agreement as to who was to be liable for the goods ordered.

It follows that the exception to the ruling made by the judge must be sustained.

As the case is to go back for a new trial, it becomes necessary to pass upon the ruling of the judge admitting the entry in the plaintiff's books in which the plaintiff had charged the certificates to the defendant.

It is stated in the bill of exceptions that "the only question then [at the trial] open was the question of the defendant's per-

sonal liability, which was all that he contested." Under these circumstances it was settled law before the enactment of St. 1913, c. 288, that the entry in the plaintiff's books was not admissible. *Kaiser v. Alexander*, 144 Mass. 71. But it is provided by St. 1913, c. 288, that "an entry in an account kept in a book . . . shall not be inadmissible in any civil proceeding as evidence of the facts therein stated because . . . it is hearsay or self-serving, if the court finds that the entry was made in good faith in the regular course of business and before the beginning of the civil proceeding aforesaid."

The terms of St. 1913, c. 288, follow those used in R. L. c. 175, § 66. The former act must be held to make accounts admissible in evidence although they are self serving, provided they were made in good faith in the regular course of business and before the beginning of the court proceedings in question.

This is an exception to the general rule as to the admissibility of self-serving statements made by a party to an action in court. Why this exception should have been made is not apparent. Under this statute, if a party should make a self-serving statement in good faith by proclaiming it in public upon the housetops or including it in a number of letters published in the public prints, it is still inadmissible. But by this statute an exception to the general rule is made, and a self-serving entry in the plaintiff's private book of account known to no one but himself is made evidence of the facts there stated. What weight should be given to evidence of this kind in view of the general rule of the common law, is for the jury or the judge (if the case is tried without a jury) to decide. But the evidence has been made competent by the statute and cannot be objected to if offered in evidence.

Exceptions sustained.

The case was submitted on briefs.

G. L. Wilson, pro se.

A. M. Schwarz & S. A. Dearborn, for the plaintiff.

CHARLES D. TURNBULL, trustee, vs. CHARLES E. WHITMORE
& others.

Suffolk. March 16, 1914. — May 26, 1914.

Present: RUGG, C. J., LORING, SHELDON, & CROSBY, JJ.

Trust, Construction, Termination.

A paragraph of a will made in 1879 contained a provision placing in the hands of trustees a fund of \$100,000 and all of the testator's shares in a certain building trust, the paragraph closing with the words: "And it is my wish to establish this trust to continue during the lives of my wife, my two sons and my daughters, M and C, and during the life of the longest liver of them." There next followed a paragraph directing the trustees to pay quarterly to the wife and to each of the daughters M and C \$2,000 a year, "such payments to be made from the income and if necessary from the principal of said trust fund of \$100,000." A later paragraph of the will read: "At the death of the survivor of all my children, my trustees are to divide the capital fund equally among the children of my five children (being the four already named and my daughter A) each grand-child taking one equal share, this division to be per capita and not per stirpes and the issue of any of my grand children to stand in the place of the parent." At the time the will was made A was a widow thirty-nine years of age, who had received a considerable estate at the death of her husband. In 1913, after the death of all the children excepting A, who was childless, the trustees petitioned for instructions as to whether the time for the termination of the trust had arrived, or whether distribution should await the death of A. *Held*, that it was the evident intention of the testator that the trust should not be terminated until the death of all his children, because otherwise the will would operate to create a discrimination among the testator's grandchildren, which it was his evident intention to avoid; and that therefore distribution must await the death of A. In case of irreconcilable differences between provisions in a will, a clear and unambiguous provision, coming later in the will, controls, as being more likely to express the final purpose of the testator.

BILL IN EQUITY, filed in the Probate Court for the County of Suffolk on July 29, 1913, by the trustee under the will of Charles O. Whitmore, late of Boston, for instructions.

It appeared that the property placed in the hands of the plaintiff in trust was a fund of \$100,000, and "all of the shares in the capital stock of the Lexington Buildings Association of which I shall die possessed." The first clause, mentioned in the third paragraph from the end of the opinion, immediately followed the paragraph first quoted in the opinion and was as follows:

"I direct my said trustees to pay in quarterly payments, to my wife, Mary E. Whitmore and to each of my two daughters named, Martha H. and Charlotte R. clear of taxes, or charges of any kind, two thousand dollars apiece, per annum, during the life of each, such payments to be made from the income and if necessary from the principal of said trust fund of one hundred thousand dollars."

Other material provisions of the will are described in the opinion, where additional facts also are stated.

The suit was heard in the Probate Court by *Grant, J.*, who made a decree ordering an immediate distribution of the fund. Upon an appeal by Charles E. Whitmore from that decree, the case was reserved by *Rugg, C. J.*, for determination by the full court.

H. R. Morse, for the defendant Charles E. Whitmore.

K. McLeod, for the defendant Anne L. Whitmore and others.

J. G. Palfrey, guardian *ad litem* for minors and persons not ascertained or not in being, was permitted to file a brief.

CROSBY, J. This is a bill for instructions brought by the trustees under the will of Charles O. Whitmore. The will is dated March 15, 1879. The testator died on November 15, 1885; he was twice married; his first wife died in 1849, his second wife survived him and died in 1898. The testator's children were all by his first wife. The only child now living is Mrs. Anna L. Van Rensselaer; she is a widow, without issue, and seventy-four years of age. The grandchildren of the testator are the children of his two sons: Charles E. Whitmore, son of William H. Whitmore; and Sarah O. M. Whitall, Mary I. P. Brown and Anne L. Whitmore, children of Charles J. Whitmore. At the end of the paragraph of the will providing for the establishment of the trust, the following provision appears: "And it is my wish to establish this trust to continue during the lives of my wife, my two sons and my daughters, Martha H. and Charlotte R., and during the life of the longest liver of them." The sixth paragraph of the third clause of the will, which appears therein later than the paragraph above quoted, provides: "At the death of the survivor of all my children, my trustees are to divide the capital fund equally among the children of my five children (being the four already named and my daughter Anna L. Van Rensselaer of New York) each grand-child taking one equal share, this division

to be per capita and not per stirpes and the issue of any of my grand children to stand in the place of the parent." All of the testator's children except Mrs. Van Rensselaer having deceased, the principal question presented is whether the capital of the trust fund shall be immediately distributed among the grandchildren, or whether such distribution is to be postponed until the death of Mrs. Van Rensselaer.

Mrs. Van Rensselaer was given no share, either in the income or principal, of the trust fund. Charlotte R. Whitmore, the last surviving child of the testator except Mrs. Van Rensselaer, died July 11, 1913. If the trust is to be terminated at this time the four surviving grandchildren will each take one quarter, as the distribution is to be *per capita*. If, however, the trust is to continue until the death of Mrs. Van Rensselaer, as the grandchildren take the income by right of representation from their parents, the appellant Charles E. Whitmore will receive one half, and the children of Charles J. Whitmore will take the other half, until such time as the principal of the fund is distributed. It is urged by the children of Charles J. Whitmore that, when the testator declared, "and it is my wish to establish this trust to continue during the lives of my wife, my two sons and my daughters Martha H. and Charlotte R. and during the life of the longest liver of them," he thereby limited the duration of the trust.

It is a familiar rule of law that the particular language of a will, as well as its general scope and purpose, is to be considered in determining the intention of the testator as expressed in it. A reading of this will clearly indicates that the testator intended by the establishment of the trust to provide an income for his wife, his sons and his daughters Martha and Charlotte; it is probable that he did not deem it necessary to make provision for the maintenance of his daughter Mrs. Van Rensselaer, she having received a considerable estate upon the decease of her husband. The language used in the paragraph creating the trust for the benefit of his wife and four children does not refer to the disposition of the principal, and would seem to be more in the nature of a declaration as to the persons who were to be the beneficiaries of the income thereunder than to express the time and manner of the distribution of the principal. *Pope v. Pope*, 209 Mass.

432. We cannot read the sixth paragraph of the third clause of this will without it being manifest that it was the intention of the testator to make provision for his grandchildren, and there is nothing to indicate that he intended to discriminate against any of the children of his sons or daughters; it is to be assumed, in the absence of anything to the contrary, that all his grandchildren were to be treated equally, and share alike in the final distribution of the principal of the trust. It is to be remembered that when the will was made Mrs. Van Rensselaer was thirty-nine years of age, and was next to the youngest child — at that time she might have married again and have had children. Accordingly when he provided for the termination of the trust “at the death of the survivor of all my children” by an equal division “among the children of my five children (being the four already named and my daughter, Anna L. Van Rensselaer of New York),” we cannot doubt that he intended the children of his daughter Anna should share with his other grandchildren.

It has been argued that in view of the language of the testator that “at the death of the survivor of all my children,” he meant to include only the four children who had been previously mentioned in the will, and only the children who had been given a share in the principal and income of the fund, and that the words, “all my children,” are an ellipsis for the words, “all my said children,” and that the testator overlooked his wife in this clause because of his previous direction that the trust fund was to continue during her life. It is undoubtedly within the power of the court, in order to give effect to the obvious intention of the testator, where express and formal words have been omitted, to supply them by implication so as to carry into effect his intention if it can be reasonably ascertained from the language used, as was said by Gray, C. J., in *Metcalf v. Framingham Parish*, 128 Mass. 370, 374: “If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared.” *Boston Safe Deposit & Trust Co. v. Coffin*, 152 Mass. 95. *Jones v. Gane*, 205 Mass. 37. *Sanger v.*

Bourke, 209 Mass. 481. We are of opinion that upon a reading of the whole will the intention of the testator as to when the trust is to terminate fully appears, and that the court is not required to supply any defects by implication in order to carry into effect such intention; therefore, the rule stated in *Metcalf v. Framingham Parish*, *ubi supra*, has no application to the case at bar. It is the duty of the court to ascertain the intention of the testator in view of the words which he used; such words are to be given their natural and customary meaning in the absence of evidence that they were employed in a different sense. *Sanger v. Bourke*, *ubi supra*. *Heard v. Read*, 169 Mass. 216. *Gray v. Sherman*, 5 Allen, 198.

We are satisfied that when the testator wrote into his will the sixth paragraph of the third clause, he intended that the trust should terminate upon the death of all his children, and that it was not intended by him that it should end with the death of his widow and the four children who were beneficiaries of the income of the trust. As we have said before, the will plainly shows that the testator intended to provide for all his grandchildren. If the interpretation contended for, that the trust is not terminated, is adopted, certain grandchildren might be excluded from any participation in the principal of the fund. This would follow if the four children, other than Mrs. Van Rensselaer, had died, the latter survived and thereafter having children. Such children would not share in the fund. So, too, if Mrs. Van Rensselaer should survive the four children of the testator and should have children, some of whom were born before the death of the four children of the testator and some afterwards, the former would take under the trust and the latter would be excluded. Again, if the four children should die leaving no issue, leaving Mrs. Van Rensselaer surviving, and she should leave a child or children born after the death of all her brothers and sisters, such child or children would not be entitled to the fund, but it would vest in the charities mentioned in the will. We cannot believe that the testator intended to dispose of the principal of the trust to the exclusion of his lineal descendants, or that he intended to make any distinction between his grandchildren.

If these clauses of the will are to be regarded as repugnant to one another, then the familiar rule of construction is to be invoked,

and the later clause must be taken as the expression of the testator's final intention. As was said by this court in *Shattuck v. Balcom*, 170 Mass. 245, 251: "It is to be assumed that the testator intended the different provisions of his will to be consistent with one another. They are to be construed, if they reasonably can be, consistently with the testator's intention, so as to avoid repugnancy. In case of irreconcilable differences, a clear and unambiguous provision, coming later in the will, controls, as being more likely to express the final purpose of the testator. For the purpose of arriving at the testator's intention in respect to any particular portion or portions of the will which are doubtful, the whole instrument will be considered."

We are of opinion that under the sixth paragraph of the third clause of the will the trust was not terminated upon the death of the testator's daughter, Charlotte R. Whitmore, but is to continue until the death of Mrs. Van Rensselaer.

It has been argued that the testator's wish that the trust should last for the life of his wife is in conflict with the disposition of the principal of the fund; but upon an examination of the terms of the trust it will be seen that the provision for the testator's wife is expressly payable under the first clause of the will, "from the principal of said trust fund of one hundred thousand dollars," and that the income from the fund derived from the Lexington Buildings Association is to be divided among the four children named to the exclusion of the wife. Under these circumstances it would not seem that the disposition of the fund after the death of all the testator's children is inconsistent with the provision made for his wife.

The only other question presented relates to the disposition of income. The fifth paragraph of the third clause of the will provides that "in case of the death of both my daughters without lawful issue, the income, to which the survivor of the two was entitled, shall thereafter be equally shared between my two sons, the issue of a deceased son to stand in the place of the parent." In view of this paragraph the income accruing between the last distribution of income and the death of Anna L. Van Rensselaer is to be distributed, one half to Charles E. Whitmore and one half to the children of Charles J. Whitmore.

The decree of the Probate Court is reversed. Costs as between

solicitor and client are allowed, to be paid out of the fund, the amount thereof to be determined by a single justice.

So ordered.

JOHN POTTERTON & another vs. SEARS B. CONDIT, JR.

Suffolk. March 11, 1914. — May 28, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & CROSBY, JJ

Patent. United States Courts. Jurisdiction. Contract, Construction. Equity Pleading and Practice, Findings of judge. Words, "Found."

A suit in equity founded on an alleged breach of a contract in writing, to pay a stipulated royalty on the selling price of an appliance patented by the plaintiff and manufactured and sold by the defendant under an exclusive license from the plaintiff, can be maintained in our courts; as the United States courts under U. S. Rev. Sts. § 711, cl. 5, do not have exclusive jurisdiction of such a suit brought upon the contract and arising out of it, even where the validity of a patent incidentally is drawn in question.

In a suit founded on an alleged breach of a contract in writing in failing to pay a stipulated royalty on the selling price of an appliance patented by the plaintiff and manufactured and sold by the defendant under an exclusive license from the plaintiff, where it appears that by a provision of the contract the defendant was to be excused from paying the royalty if the plaintiff's patent should be "found at any time to infringe other patents," the word "found" must be construed to mean found by a court of competent jurisdiction; and the fact that the defendant received from another manufacturer a notice that the alleged patent of the plaintiff was an infringement of a patent used by such manufacturer, which was followed by no further action on his part, is immaterial.

Where a suit in equity is reported to this court with the consent of the parties by the trial judge, who states his findings of fact but does not report the evidence, the findings of the judge must be taken to be true.

CROSBY, J. The subject matter of the contract upon which this suit is brought is a patent granted on a pipe cap for outdoor wiring, issued to the plaintiff Potterton. As the suit is brought upon the contract and arises out of it, the question presented is not one where the federal courts have exclusive jurisdiction under U. S. Rev. Sts. § 711, cl. 5. *Marshall Engine Co. v. New Marshall Engine Co.* 199 Mass. 546.

The case is before us upon a report made by a judge of the

Superior Court.* It is agreed that on May 29, 1909, the plaintiffs were the owners of an invention described in an application for letters patent in the name of the plaintiff Potterton, and that on that day the plaintiffs and the defendant entered into a written agreement by the terms of which the plaintiffs granted to the defendant the exclusive license to manufacture, use and sell the invention described in the application for letters patent. Afterwards, on November 2, 1909, the patent was granted to the plaintiffs. "After the making of the contract the plaintiffs delivered to the defendant the patterns and other personal property referred to in the bill for his use in manufacturing and selling under the terms of the contract." The third paragraph of the agreement is as follows: "3. The party of the second part agrees to pay to the parties of the first part five per cent (5%) of the selling price derived from the manufacture and sale of any and all pole caps under this license whether manufactured directly by the party of the second part or by the sub-licensees of the party of the second part; the minimum amount to be paid in royalties on pole caps as covered by pending application, Serial No. 411906, not to be less than Five Hundred Dollars (\$500.00) in each year. The parties of the first part further agree that in case of severe competition in pole caps in which it is necessary for the party of the second part to sell pole caps as covered by pending application, Serial No. 411906, at less than cost or in case of patent litigation or for any cause whereby it becomes a hardship for the party of the second part to pay the stipulated amount Five Hundred Dollars (\$500.00) on account of royalties as above provided for, then the party of the second part shall have the right to cancel this agreement on ninety days' written notice; it being the intent and purposes of this contract that both parties shall give such attention and so conduct their part hereunder that the business shall be as highly beneficial as possible to all parties, and to this end, the parties of the first part agree not to enter into competition with the pole caps of the party of the second part and not to aid any such competition in any way." The sixth paragraph of the agreement provides: "6. The said

* *Jenney, J.*, before whom the case, a suit in equity, was tried and who with the consent of the parties reported it for determination by this court.

parties of the first part agree to put said party of the second part promptly in possession of all information, including descriptions, drawings, patterns, etc., they may be possessed of in order to enable the said party of the second part to manufacture; and the said party of the second part agrees to use all diligence in pushing the manufacture and sale of pole caps in accordance with this contract. The party of the second part further agrees during the term of this agreement not to manufacture pole caps of any other type than that of this agreement, unless said pole caps shall be found at any time to infringe other patents, in which case he shall be excused from his obligations under paragraphs 3 and 6, as he shall also in case the patent or patents on the pole caps of the parties of the first part shall be found to be invalid in any essential respect."

On or about December 2, 1909, and while the contract was in force, the defendant received a letter from the Gillette-Vibber Company, notifying him that the pipe cap manufactured by him was an infringement of a patent owned by that company, and forbidding him from "further infringement by either making, using or selling such pipe caps." The notice so received by the defendant was communicated by him to the plaintiffs. The attorneys of the latter replied to the letter above referred to, and the report states that "The Gillette-Vibber Company has taken no further action and made no further communication to either plaintiffs or defendants concerning the subject matter of the correspondence hereinbefore set forth." "There has been no judicial determination that the Potterton cap infringes the Vibber patent, nor has there been any patent litigation involving the Potterton patent, the Potterton caps or the Vibber patent."

The defendant notified the plaintiffs by letter dated May 28, 1910, that the contract "would have expired shortly if it had not been long since terminated, . . . that it is at an end," and offered to render an account and pay whatever was due. At the hearing in the Superior Court the plaintiffs waived any claim to recover for any breach of the contract except for the minimum price of \$500 under clause 3 and for the return of the personal property therein referred to. The judge found that there was no fraud or concealment on the part of the plaintiffs or either of them.

The evidence offered by the defendant of a certified copy of the patent issued to W. H. Vibber for pipe cap for outdoor wiring and of the file wrapper of the Potterton patent, as well as the evidence that the pole caps manufactured under the Potterton patent were an infringement of the Vibber patent, was all properly excluded. None of the evidence excluded was competent upon the issue of fraud in view of the finding of the judge that "there were no representations made [by the plaintiffs] at the time of or prior to making the contract concerning the Vibber patent." The evidence was not admissible upon the question of infringement or upon any other ground. It is generally held that a licensee of a patent cannot avoid the payment of royalties merely because it is asserted that the device described in the patent is an infringement of some other patent. It has been held, however, that a licensee, in order to avoid the payment of royalties, must prove an eviction or what is equivalent thereto. *White v. Lee*, 14 Fed. Rep. 789. *Consumers' Gas Co. v. American Electrical Construction Co.* 50 Fed. Rep. 778, 780. *Bradford Belting Co. v. Kissinger-Ison Co.* 113 Fed. Rep. 811, 814, 815. In the case of *Standard Button Fastening Co. v. Ellis*, 159 Mass. 448, 449, 450, this court said: "But where a mere license is given, it is held that there is no failure of consideration till the licensee is actually prevented from using the invention." We are of opinion that under the sixth paragraph of the contract the word "found" in the clause "unless said pole caps shall be found at any time to infringe other patents" must be construed to mean found by a court of competent jurisdiction. This word implies a finding after judicial inquiry. Webster's International Dictionary, 817. 19 Cyc. 534. Upon a judicial determination that the patent was an infringement of another patent the obligation of the defendant would end automatically. It not having been determined that the manufacture of pole caps is an infringement of any other patent, the defendant is liable, under the third paragraph of the contract, for the minimum price of \$500.

The judge has found that there has been no accounting between the parties and that the defendant has paid the plaintiffs nothing on account of the contract. He has also found that the letter of May 28, 1910, did not terminate the contract and "that the defendant continued to sell under the contract after

the expiration of the period of time fixed by the contract for the termination of the same after the giving of notice." In view of the last finding, the contract is to be regarded as terminated on November 16, 1910, in accordance with the agreement of the parties entered into on that date. As the evidence is not reported, the findings of the judge who heard the case should be taken to be true as to all facts found by him.

In accordance with the terms of the report a decree is to be entered in favor of the plaintiffs for the return of the patterns and property therein referred to, and for the payment to the plaintiffs by the defendant of the sum of \$733.32, with interest from November 16, 1910.

So ordered.

E. E. Kent, (J. T. Brennan with him,) for the plaintiffs.

A. W. Blakemore, for the defendant.



HITTINGER FRUIT COMPANY & another vs. CITY OF CAMBRIDGE.

Middlesex. March 27, 1914. — May 29, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Watercourse. Waterworks. Cambridge. Equity Jurisdiction, To restrain diversion of watercourse, Alternate relief. Damages, For property taken or injured under statutory authority.

Under St. 1892, c. 421, § 1, authorizing the city of Cambridge to "take and hold, by purchase or otherwise . . . any land, rights of way, easements and real estate necessary for constructing, maintaining and protecting a distributing reservoir," that city had no right to acquire underground waters which were the source of a natural stream, or to divert or diminish the waters of such a stream, at least so far as such acquisition was not necessarily incident to the proper construction and use of its distributing reservoir and of the pipes leading into and out of such reservoir. Consequently a fruit grower through whose land a natural brook flowed, the waters of which were diverted by the taking by the city of Cambridge of the land containing the source of the brook for the construction of such reservoir, has no remedy by a petition for the assessment of damages and may maintain a suit in equity against the city for appropriate relief.

In a suit in equity by a fruit grower, through whose land a natural brook flowed, against a city that without authority had diverted the waters of the brook in taking the land that contained the source of the brook for the construction

of a distributing reservoir, a decree is proper which orders the defendant either to cease to interfere with the natural flow of the brook as it was when the defendant began the construction of its reservoir, or else to deliver daily into the brook not less than the number of gallons of water which was the average daily flow of the brook in its natural condition. And it is not a valid objection to this decree, that the natural flow of the brook varied and was uncertain in amount from time to time and that the plaintiff was entitled only to a variable supply of water.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 31, 1911, by the Hittinger Fruit Company, a corporation organized under the laws of this Commonwealth and having its place of business in Belmont, and Richard Hittinger of Belmont, against the city of Cambridge, alleging that the plaintiffs were the owners of about forty acres of land in Belmont where they were engaged in the cultivation of fruit and vegetables, that a brook flowed through their land which was a natural watercourse, and that the defendant had diverted and withdrawn the water from this brook, praying for an injunction and for other and further relief.

The case was referred to Samuel C. Bennett, Esquire, as master. Among other facts the master found that the defendant in taking land for the construction of a distributing reservoir had taken the land containing the source of the brook that flowed through the plaintiffs' land and thus had diverted its waters. On this matter his finding was as follows:

"I find that the waters within the basin-like area [taken for the reservoir] first issued to the surface of the earth and thence flowed in a defined channel within the area of the land taken by the defendant, and finally converged into a single channel at a point some distance within the said taking and within the bounds of the southern half of the present reservoir and in the southeasterly part thereof, and from this point of convergence ran in a defined channel out of the basin-like area at its southeast corner, and thence ran to the eastward as already described. I find, if it is a question of fact, and rule, if it is a question of law, that the said waters thus running constituted a brook or stream.

"I find, if it is a question of fact, and rule, if it is a question of law, that by the time these waters had reached the said southeast corner of the basin-like area and were issuing therefrom, they had taken on the characteristics of a running stream, brook or rivulet."

From the other findings of the master it appeared that this was the stream or brook that flowed through the plaintiffs' land. Other important findings which appeared by the master's report are stated in the opinion.

The case came on to be heard by *Crosby, J.*, upon the defendant's exceptions to the master's report and was reserved by the justice upon the pleadings, the master's report and the defendant's exceptions thereto for determination by the full court.

H. Parker, (J. F. Aylward & H. H. Fuller with him,) for the defendant.

A. E. Pillsbury & G. M. Palmer, for the plaintiffs.

SHELDON, J. The defendant city acquired this land by a taking thereof made under St. 1892, c. 421, § 1. By that act the defendant was authorized to "take and hold, by purchase or otherwise, . . . any land, rights of way, easements and real estate necessary for constructing, maintaining and protecting a distributing reservoir, and also whatever may be necessary for laying, constructing, maintaining and protecting suitable aqueducts, pipes, water courses and other works to convey water, from Fresh Pond in Cambridge and from Stony Brook in Waltham and Weston, into such distributing reservoir and out of the same into and through said city of Cambridge." Under this authority the defendant by proper instruments, duly recorded, took the land, describing it particularly "for a distributing reservoir." It since has taken from the former owners deeds of the land in fee.

Through a part of this land and out of it there ran a natural stream of water through and into the land of the plaintiff corporation (hereinafter called the plaintiff), which was of value to it. The defendant built a distributing reservoir upon the land. This was so constructed that water leaked from it and ran into the stream, considerably increasing the flow of water therein. The defendant desired to stop this waste of its water, and for that purpose, and in order also to gather into the reservoir the underground waters of its land, did the acts found and reported by the master, and threatens to continue and carry them out to such an extent as not only to take away the increased flow caused by the leakage from its reservoir (of which the plaintiff could not complain), but greatly to diminish or even to destroy the natural flow

of water in the stream; and this will practically make it useless to the plaintiff and thus cause the plaintiff serious injury. What the defendant did was not necessary for the construction, the maintenance or the use of its reservoir.

The defendant must be held liable for this practical destruction of a natural stream to the injury of a lower proprietor, unless there is some justification for its acts.

The defendant contends that by its taking and the deeds which it has taken from the former owners it has acquired full title to the land, and has the right to intercept the water percolating through the soil of its property, although those waters otherwise would run into the stream, and although the effect of this may be to diminish the flow of the stream so as to render it useless to a lower proprietor, and that upon the findings of the master it has done no more than this.

We need not consider whether an upper riparian proprietor can intercept the underground waters flowing by mere percolation and not in any defined channel into a natural stream, to such an extent as materially to diminish the natural flow of that stream to the injury of the lower proprietors. The decisions as to this have not been wholly in accord. See *Smith v. Brooklyn*, 18 App. Div. (N. Y.) 340 and 160 N. Y. 357; *Dickinson v. Grand Junction Canal Co.* 7 Exch. 282; *Broadbent v. Ramsbothom*, 11 Exch. 602; *Chasemore v. Richards*, 7 H. L. Cas. 349. The defendant has not the rights of an ordinary proprietor. It had authority to take the land, only for the construction of a distributing reservoir. It took no water rights whatever. It acquired no right, as against owners upon the stream, to appropriate the underground water, or to diminish the natural flow of the stream or lessen the volume of water therein, at least so far as this was not necessarily incidental to the proper construction and use of its reservoir and the pipes leading into or out of the same. *Hart v. Jamaica Pond Aqueduct*, 133 Mass. 488, 489. In *Cowdrey v. Woburn*, 136 Mass. 409, 411, the respondent was held liable, not only for water taken from the petitioner's pond by percolation through an embankment, but for water which the respondent had intercepted by wells and thus prevented from flowing into the pond, as otherwise it would have done. The court said: "The town of Woburn does not stand in the same position as an ordinary landowner. All its powers in the

premises are derived from the statute. It has no authority to take or purchase lands for the purpose of appropriating underground currents of water without compensation to persons injured." Other decisions of this court to the same effect are cited and followed in *United States v. Alexander*, 148 U. S. 186, 192.

It is not material that the defendant has acquired title to the land by deeds from the former owners thereof. Its power to purchase, like its power to take, comes only from the statute. This also was decided in *Cowdrey v. Woburn, ubi supra*. To the same effect see *Hollingsworth & Vose Co. v. Foxborough Water Supply District*, 165 Mass. 186; *Ætna Mills v. Brookline*, 127 Mass. 69, 72.

The plaintiff's remedy could not have been by a petition for the assessment of the damages occasioned by the defendant's taking and its subsequent acts. As we have seen, the defendant had not taken these water rights. *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361. *Lexington Print Works v. Canton*, 167 Mass. 341, 344. *Smith v. Stoughton*, 185 Mass. 329, 333.

The defendant is not helped by the case of *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 373. In that case, land which included two swamps had been taken, among other purposes, "for forming and erecting dams, reservoirs, to take and hold water." The swamps had been dug out, their outlets dammed, and a reservoir constructed, "to take and hold water." It was held that there had been a valid taking of all the water which gathered in the reservoir from springs or by percolation. In the case at bar, nothing was taken but land for "a distributing reservoir," into which was to be brought water from two specified sources, and from which it was to be carried into the defendant city. The distinction is obvious, and there is no need of enlarging upon it.

None of the defendant's exceptions to the master's report can be sustained. We cannot review those which relate to findings of fact, because the evidence is not reported. Those which relate to rulings upon the effect of those facts are not open. *Cook v. Scheffreen*, 215 Mass. 444. But the defendant practically has had the benefit of them, in passing upon the questions of law presented to us. So far as these exceptions are material, they are covered by what has been said.

The plaintiff is entitled to equitable relief. The decree presented in the report gives to the defendant the option of ceasing to interfere with the natural flow of the stream as it was when the defendant began the construction of its reservoir, or else of delivering into the stream not less than fifty thousand gallons of potable water daily, that being the average daily flow of the stream in its natural condition. The defendant insists that this gives an unwarranted advantage to the plaintiff; that the flow of the stream was variable and uncertain, and that the plaintiff is entitled only to that variable and uncertain amount, and not to the average amount of the daily flow. But the answer to this contention is obvious. The defendant has taken away what the plaintiff was entitled to have. Justice would require the defendant to undo what it wrongfully has done, and no longer to interrupt, divert or interfere with the natural flow of the waters forming the stream. This would impose much hardship and expense upon the defendant. It would require the removal of some of the defendant's works and the restoration of the natural condition of things, which after the expenditure of a considerable amount of money would leave the defendant under the necessity of either losing much of its own water by leakage from its reservoir or of spending yet more money to stop the leakage which has resulted from the original faulty construction. In order to lessen as far as possible the burden to be put upon the defendant, the suggested decree offers to the defendant an alternative, that of giving to the plaintiff the average daily flow of water. The defendant can do this at but slight inconvenience to itself. No other alternative has been suggested, except to require the defendant to put into the brook each day just the amount of water which would make up the natural flow of the stream on that day. But what the amount would be has not been and very likely could not be determined. Some seasons are drier and some are wetter; the natural volume of the stream would vary not only from day to day, but from year to year. To require the defendant to furnish just that amount of water from day to day would subject it to a very onerous burden; and on the other hand the plaintiff never could know whether on any particular day or days it was receiving just the amount of water to which it was entitled. Both parties went to a hearing upon the master's report without asking for

any more specific findings than had been made, by statement of the amount of flowage on certain days and times and of the average flowage. The defendant did not ask, and has not asked before us, for a determination of the question, just what the future daily flow of the stream, if it had not been interfered with, would have been, and how it would have varied from day to day and from season to season. If that amount could be ascertained, it would be perhaps both more difficult and more expensive for the defendant so to adjust its pipes and meters as to furnish an amount of water varying, sometimes it may be largely varying, from time to time, than to make one adjustment once for all to furnish a fixed amount. But after all, the defendant has the option at its own election of giving to the plaintiff just what it ought to give, by undoing what it wrongfully has done. If the defendant unjustifiably has mingled with its own waters other water of which the plaintiff was entitled to have the beneficial use, the defendant has gained no equitable rights by this; it must at its peril return to the plaintiff as much as it thus has appropriated. *Ryder v. Hathaway*, 21 Pick. 298. *Willard v. Rice*, 11 Met. 493. *Stearns v. Herrick*, 132 Mass. 114. *Levyreau v. Clements*, 175 Mass. 376. *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108. *The Idaho*, 93 U. S. 575, 584, *et seq.* *Westinghouse Electric & Manuf. Co. v. Wagner Electric & Manuf. Co.* 225 U. S. 604, 618. The defendant cannot complain that it is allowed the choice of an alternative which may be less onerous.

A decree will be entered for the plaintiff in the form annexed to the report, but modified by adding the costs in this court.

So ordered.

MARY E. B. EMERY vs. SAMUEL W. EMERY & others.

Suffolk. December 5, 1913. — June 15, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, SHELDON, DE COURCY,
& CROSBY, JJ.*Domicil. Probate Court, Jurisdiction.*

Where a man who theretofore had had his domicil in a city in another State, declared his purpose to give up his residence there and establish his home in a city in this Commonwealth and this declared intention was manifested by unequivocal acts both as to the relinquishment of his former residence and the acquisition of the new one, the fact that he retained a large dwelling house and fourteen acres of land in the city of his former residence in the other State, which he was unable to dispose of in spite of his efforts to do so, and that during two winters his wife kept this house open although she often was with her husband in this Commonwealth, and the fact that while dwelling in this Commonwealth he lived in a hired house or in an apartment hotel until his death here, are not inconsistent with a finding that his domicil at the time of his death was in the county in this Commonwealth in which he lived, and accordingly it may be found that the Probate Court of that county has jurisdiction of a petition for the proof of his will.

PETITION, filed in the Probate Court for the County of Suffolk on December 10, 1912, for the proof of the will of Samuel W. Emery, who died on November 29, 1912, and whose residence at the time of his death was alleged to have been Boston.

A decree was made by *Grant, J.*, allowing the will. A son and two daughters of the alleged testator appealed from the decree. They also filed a paper called a "plea and motion," in which it was alleged that the domicil of Samuel W. Emery at the time of his death was not at Boston but was at Portsmouth in the State of New Hampshire and it was prayed that the decree of the Probate Court admitting his alleged will to probate should be set aside and that the petition for the proof of such alleged will should be dismissed.

The case was heard by *Rugg, C. J.*, upon the "plea and motion" of the appellants mentioned above. The Chief Justice made a memorandum of findings, including the facts stated in the opinion. He found that Samuel W. Emery was at the time of his death an inhabitant of or resident in the county of Suffolk within the mean-

ing of R. L. c. 162, § 3, and that therefore the petition properly was filed in the Probate Court for that county. He made an interlocutory decree denying the plea and motion. The appellants appealed; and the Chief Justice reported the questions of law raised by the appeal from the interlocutory decree for determination by the full court, it being agreed that the findings of fact made by him should be accepted without a report of the evidence.

The case was argued at the bar in December, 1913, before *Rugg, C. J., Loring, Braley, & De Courcy, JJ.*, and afterwards was submitted on briefs to all the justices.

S. W. Emery of New Hampshire, (*J. P. Richardson* with him,) for the appellants.

E. C. Stone, for the appellee.

DE COURCY, J. This case is before us on a report after an appeal from the interlocutory decree denying the "plea and motion;" it being agreed that the findings of fact made by the Chief Justice should be accepted without a report of the evidence. The only question raised is whether the correct inference to be drawn from the facts found is that the domicile of Samuel W. Emery at the time of his decease was in Suffolk County in this Commonwealth, where his will was filed for probate. R. L. c. 162, § 3. *Harvard College v Gore*, 5 Pick. 370. *Shaw v. Shaw*, 98 Mass. 158. And under the terms of the report we stand where the Chief Justice stood in drawing the inference of residence from the facts. *Harvey-Watts Co. v. Worcester Umbrella Co.* 193 Mass. 138.

Previous to January, 1905, the domicile of Samuel W. Emery was in Portsmouth in the State of New Hampshire. He was a trial lawyer of distinction, had been county attorney and city solicitor, and was then judge of the municipal court. It is found as a fact, and is not disputed by the appellants, that Mr. Emery in 1905 formed a fixed and *bona fide* intent and purpose to give up his domicile in New Hampshire and to acquire one in Massachusetts, and that this intent continued constant until his death in November, 1912. This purpose was manifested not only by statements made publicly and privately that he had given up Portsmouth permanently and proposed to remove his practice and residence to Massachusetts, but by significant acts such as his resignation as judge of the municipal court of Portsmouth and as member of the New Hampshire Bar Association. In short, he appears to have

done everything that reasonably could be expected in carrying out his purpose to sever his connection with his domicile of origin. The fact that he retained his large house with its fourteen acres of land was due to his inability to dispose of such a property, notwithstanding his many efforts to do so.

As already said, it is undisputed that Mr. Emery had a clear and honest purpose to establish his legal domicile here. With that intent the fact of residence must concur. But, as was said by Knowlton, C. J., in *Barron v. Boston*, 187 Mass. 168, 170, "The only act, apart from the intention of the actor, which is absolutely necessary to the acquisition of a domicile in a city or town, is that at some time the person must go to the place and take up his abode there. If he is abiding there while his domicile is elsewhere, and if while so abiding he forms an intention immediately to make it his home permanently or for an indefinite period, and continues to abide there in pursuance of that purpose, he thereby acquires a new domicile." The record discloses facts which show decisively that Mr. Emery carried into actual execution his intention to acquire a domicile here. He transferred his law office from Portsmouth to Boston. He was admitted to the bar of this Commonwealth, and was appointed a justice of the peace in Massachusetts; and in both applications he described himself as of Boston. By his direction he was designated as Samuel W. Emery of Massachusetts in the reports of cases thereafter argued by him before the New Hampshire Supreme Court. In numerous written instruments, including a mortgage of his house in Portsmouth and leases of his offices, he described himself as of Boston; and always so registered at hotels. His political and municipal rights and duties were located here, where he paid his poll taxes and exercised the elective franchise. As to his place of abode, it appears that from the time when Mr. Emery moved to Boston in 1905 he always lived here except during the summer season of each year. When he first came, he and his wife spent much time in Boston and its neighborhood looking for a suitable house. Failing to find one that satisfied her, he hired a room at a hotel for a time, and thereafter usually occupied apartments comprising several rooms, which he leased by the year. A furnished house was rented in October, 1907, and occupied until the following May. Ordinarily his family was with him, except in the spring of 1912, when

Mrs. Emery visited her sister in the south, and in the two winters of 1908-09 and 1910-11, when she kept open the Portsmouth house but often was with her husband in Boston. While the facts with reference to the occupation of the Portsmouth house, if considered alone and unexplained, might render it at times somewhat uncertain and equivocal which of the two places of residence was his legal domicil, the other facts clearly indicate that he carried out his admitted honest purpose to establish his real home in Boston; and all the facts are consistent with this constant intent on his part. It seems probable that his failure to purchase a house in Boston was due largely to his inability to sell the Portsmouth property. However that may be, it is immaterial that while here his residence was in a hired house or in an apartment hotel. As was said by Chitty, J., in *In re Craignish*, [1892] 3 Ch. 180, 192, "Living in lodgings and changing the lodgings from time to time are circumstances to be taken into consideration on a question of domicil; they are not inconsistent with domicil." *Wilton v. Falmouth*, 15 Maine, 479. *Ames v. Duryea*, 6 Lans. 155. *Guier v. O'Daniel*, 1 Binn. 349, note. And the change of domicil was complete notwithstanding that at times he allowed his family to remain temporarily in his former home until he could conveniently remove them to his fixed permanent residence. *Cambridge v. Charlestown*, 13 Mass. 501. *McDaniel v. King*, 5 Cush. 469, 474. *Blair v. Western Female Seminary*, 3 Fed. Cas. 1486, and see *Cochrane v. Boston*, 4 Allen, 177.

We are of opinion that the domicil of Mr. Emery at the time of his decease was in Suffolk County, and that the courts of this Commonwealth have jurisdiction of the petition for the probate of his last will. Accordingly the interlocutory decree denying the plea and motion is to be affirmed.

So ordered.

JULIA F. CHURCH, administratrix, vs. BOYLSTON and WOODBURY
CAFE COMPANY.

Suffolk. March 6, 1914. — June 15, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Practice, Civil, Amendment. Superior Court.

Under R. L. c. 173, § 48, the Superior Court has no power to allow a plaintiff to amend his declaration by adding to it a cause of action that could not have been intended when the writ was sued out, and accordingly an administrator, who has appeared in an action brought by his intestate for personal injuries, cannot be allowed to amend the declaration by adding a count under R. L. c. 171, § 2, St. 1907, c. 375, for causing the death of the plaintiff's intestate.

CROSBY, J. The plaintiff's intestate, George W. MacDonald, by a writ dated March 7, 1910, brought an action in the Superior Court for personal injuries alleged to have been sustained by him by reason of the negligence of the defendant.

MacDonald died during the pendency of the action, and the plaintiff was duly appointed administratrix of his estate and, having suggested his death, entered her appearance in the case and filed a motion to amend the declaration by adding a count in which she seeks to recover for the death of her intestate under R. L. c. 171, § 2, St. 1907, c. 375. The motion to amend has been allowed.*

The sole question presented is whether as matter of law it was within the power of the Superior Court to allow the amendment.

The statute authorizing amendments (R. L. c. 173, § 48) is very broad and under it any amendment in matter of form or substance may be allowed which may enable a plaintiff "to sustain the action for the cause for which it was intended to be brought."

It is also provided by statute that "the allowance by the court of an amendment shall be conclusive evidence of the identity of the cause of action." R. L. c. 173, § 121.

* By *Wait*, J. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which raised in various forms the question whether the amendment properly could be allowed.

The court had power to allow an amendment to enable the plaintiff to maintain the action for the cause for which it was originally intended to be brought, but it had no power to bring in a new cause of action not intended when the writ was sued out. The amendment sets forth a cause of action under a statute that is penal in its nature. It was a cause of action which not only did not exist during MacDonald's lifetime, and could not arise until after his death, but it is not brought for his benefit nor that of his estate.— *Cripps's Case*, 216 Mass. 586.

It follows as matter of law that MacDonald could not have intended to bring the action originally for his own death. Hence as matter of law the Superior Court had no power to allow an amendment to add a count to the original cause of action, alleging his death and claiming recovery therefor. See *Herlihy v. Little*, 200 Mass. 284, 289; *Strout v. United Shoe Machinery Co.* 215 Mass. 116, 119; *Polvere v. Hugh Nawn Contracting Co.* 215 Mass. 199, 204. This conclusion is not at variance with *Tracy v. Boston & Northern Street Railway*, 204 Mass. 13, and *Upson v. Boston & Maine Railroad*, 211 Mass. 446, relied on by the plaintiff.

The exceptions must be sustained and in accordance with the agreement of the parties judgment is to be entered for the defendant.

So ordered.

C. S. Knowles, for the defendant.

W. W. Clarke & C. J. Muldoon, for the plaintiff, submitted a brief.



SAMUEL DUBINSKY vs. WELLS BROTHERS COMPANY OF NEW YORK.

Suffolk. March 26, 1914. — June 16, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Contract, Construction, Performance and breach. *Equity Jurisdiction*, Damages. *Damages*, In equity, Nominal, Liquidated.

A general contractor, who had agreed with a landowner to erect a new building after demolishing an old building that was on the site, made a contract with a subcontractor by which he sold the materials of the old building to the sub-

contractor who agreed to remove them and clear the land by a day named. The subcontract provided that, upon the failure of the subcontractor "to prosecute the work satisfactorily to the architects and" the general contractor, the old building and its materials should revert to the general contractor. Repeated complaints were made by the architects and the general contractor of the manner in which the subcontractor was performing his work of demolition and removal, which resulted in the general contractor taking possession of the premises and completing the work. In a suit in equity brought by the subcontractor against the general contractor to enjoin him from demolishing the old building and removing the materials and for damages, it was found by a master that if the plaintiff had not been ejected he could have completed his work by the day named, but that this could not have been known when he was ejected by the defendant and that the repeated complaints of the architects and the defendant were made in good faith. *Held*, that by the terms of the contract it was within the power of the defendant to direct the manner of the performance of the plaintiff's work and that it was the plaintiff's duty to conform to the defendant's directions so long as the defendant acted reasonably and in good faith under an honest sense of dissatisfaction.

Where a general contractor, who has a contract with a landowner for the erection of a building after removing the old building then on the site, sells the materials of the old building to a subcontractor, who agrees to demolish the old building and remove the materials by a day named, and also deposits with the general contractor a certain sum of money, "which amount is to be forfeited in case the other conditions of the contract are not satisfactorily carried out" by the subcontractor, and afterwards the subcontractor commits a breach of the contract which inflicts no substantial damage upon the general contractor and gives him a right only to nominal damages, the deposit of money is to be treated as intended by the parties merely to secure the performance of the contract and not as liquidated damages; and, on the subcontract being terminated, the subcontractor is entitled to have the amount of the deposit returned to him after the deduction of the amount allowed as nominal damages, which in this case was \$5.

BILL IN EQUITY, filed in the Superior Court on November 10, 1911, to enjoin the defendant from demolishing the old Filene Building on the corner of Washington Street and Summer Street in Boston, which the plaintiff had agreed with the defendant to demolish and remove under an agreement in writing dated September 25, 1911, and modified by an agreement of November 1, 1911, praying also for damages.

The case was referred to Robert Cushman, Esquire, as master, who made the findings that are stated in the opinion. Upon a motion of the plaintiff to confirm the master's report, the defendant's exceptions to the report being waived, *Jenney, J.*, made an interlocutory decree recommitting the case to the master "to find and report to the court such facts as may be

relevant to the question of the right of the defendant to retain in whole or in part the sum of \$1,500 paid to it by the plaintiff under a contract between the parties dated August 25, 1911, and referred to in the report of said master now on file, so that the facts may be before the court in case it is determined that the defendant did not commit any breach of said contract." The master made a supplemental report, containing the findings on this subject which are stated in the opinion, and the defendant filed exceptions. Upon the argument of these exceptions *Jenney, J.*, made an interlocutory decree overruling the defendant's exceptions to the supplemental report and ordering that both the original and the supplemental reports be confirmed, except as to rulings of law made by the master, which were left open for consideration upon the entry of the final decree. Two days later by order of the same judge a final decree was entered, ordering "that the amount deposited under the contract between the parties was a deposit in the nature of a penalty, and that the defendant has not sustained any damage other than nominal damage to the amount of five dollars (\$5) through the plaintiff's failure to complete said contract, and accordingly that the defendant be and it hereby is ordered to pay to the plaintiff the sum of one thousand four hundred and ninety-five dollars (\$1,495) with interest on said amount from November 10, 1911, to this date," and that, "except as hereinbefore provided, it is ordered, adjudged and decreed that the plaintiff is not entitled to any relief in this case." Both the plaintiff and the defendant appealed from this decree.

The case was submitted on briefs.

D. A. Ellis & P. Rubenstein, for the plaintiff.

H. N. Berry & C. C. Bucknam, for the defendant.

CROSBY, J. The defendant in this suit in equity was the general contractor for the erection of the Filene Building in Boston, its contract including the demolition and removal of the old buildings on the site of the new one. The case was referred to a master, who found that by the terms of the contract with the owners it was provided that if the architect was dissatisfied with the manner in which the work was being performed by the defendant, he (the architect) "could take away the contract from Wells Brothers on three days' notice, and place it elsewhere."

The defendant entered into a contract with the plaintiff, by the terms of which the defendant sold and conveyed the materials in the old buildings to the plaintiff, the latter agreeing to remove them, together with all rubbish, within twenty-five week days from October 3, 1911, which time for the completion of the work was by a supplemental agreement extended to November 23, 1911. The agreement provided that upon the failure of the plaintiff "to prosecute the work satisfactorily to the architects and the party of the first part" (the defendant), the buildings and material therein should revert to the defendant.

The plaintiff entered upon the work, and after repeated complaints made to him by the defendant and by the architects between November 1 and November 9, the defendant on November 7 wrote to the plaintiff that it (the defendant) had received notice that the work was not proceeding satisfactorily according to the contract and that, if the accumulation of rubbish and debris was not removed from the premises within forty-eight hours, the defendant would take possession of the property, finish the plaintiff's contract and charge him with the expense thereof. On November 9 the defendant by letter notified the plaintiff that in accordance with its letter of the seventh "we are herewith taking possession of the buildings on Washington, Summer and Hawley Streets, on the site of the new Filene Building." The letter also requested the plaintiff to remove his employees and vacate the premises forthwith.

The master filed a report and a supplemental report, both of which were confirmed; a final decree was entered and both plaintiff and defendant have appealed from this decree.

It is apparent from the nature of the work to be performed by the plaintiff that it was of great importance to the defendant as the general contractor that the demolition of the old buildings and the removal of the materials should proceed without delay and be completed within the time limited by the contract. The master finds that both the defendant and the architect were dissatisfied with the manner in which the plaintiff was carrying on the work; that it was not being prosecuted expeditiously; that the plaintiff permitted a substantial quantity of materials and rubbish to accumulate on the premises; that the plaintiff's method of wrecking the building was not the most efficient or proper

method of doing the work; that the plaintiff refused to change the location of a derrick which interfered with the prosecution of the work by the defendant; that dust was raised on the premises by reason of insufficient watering and was the subject of complaint by the police department; and that too many teams were allowed to stand on the streets adjoining the premises. These and many other matters were the subject of complaints made by the defendant and the architect to the plaintiff, which finally resulted in the defendant's taking possession of the premises and completing the work. The master finds that if the plaintiff had not been ejected, he could have completed his contract by November 23. He further finds that whether the plaintiff would have done so could not possibly have been known as early as November 9, 1911. The master also finds that the complaints made by the architect and by the defendant to the plaintiff were made repeatedly and were made in good faith.

The plaintiff contends that the defendant was not justified in terminating the contract and taking possession of the premises, and that therefore the materials did not revert to the defendant. The determination of this question depends upon the extent of the authority of the defendant under the contract.

We are of opinion that in view of the terms of the contract it was within the power of the defendant not only to determine whether the work was being performed in accordance with the contract, but that it might direct the manner of such performance. If it was dissatisfied with the progress of the work or with the way in which it was being carried on, it was the duty of the plaintiff upon notice from the defendant to conform to the latter's orders in directing the work; and so long as the defendant acted reasonably and in good faith under an honest sense of dissatisfaction, the plaintiff was bound by its decision. *Fullam v. Wright & Colton Wire Cloth Co.* 196 Mass. 474. *National Contracting Co. v. Commonwealth*, 183 Mass. 89, 95. *Stadhard v. Lee*, 32 L. J. (N. S.) 75, 78. *Roberts v. Bury Improvement Commissioners*, L. R. 5 C. P. 310, 318.

The master's finding, that by the exercise of due care the defendant could have completed the wrecking and removal of materials without expense to it, is equivalent to a finding that the defendant did not sustain any substantial loss by reason of the breach of the

contract by the plaintiff. In view of this finding, the defendant is entitled to recover only nominal damages. As the evidence is not reported, we cannot say that the master's finding in this respect is clearly wrong.

The two exceptions taken by the defendant to the refusal of the master to rule as requested upon the degree of care necessary to be exercised by it in wrecking the buildings after it had terminated the contract with the plaintiff, cannot be sustained. They could not have been given in the form presented, but were fully covered by the ruling made by the master upon the first of the defendant's requests for rulings.*

The only other question to be determined is whether the \$1,500 deposited by the plaintiff is to be regarded as in the nature of a penalty or as liquidated damages. The first paragraph of the agreement recites "That the party of the first part [the defendant] receive a certified check for the sum of fifteen hundred dollars (\$1,500) upon the signing of this agreement, which amount is to be forfeited in case the other conditions of the contract are not satisfactorily carried out by the party of the second part [the plaintiff]."

We are of opinion that this deposit was intended by the parties to secure the performance of the contract and was not to be retained by the defendant as liquidated damages for the breach of the contract by the plaintiff.

As only nominal damages assessed in the sum of \$5 have been sustained by the defendant, the sum of \$1,495 should be returned to the plaintiff, with interest in accordance with the decree.

The interlocutory and final decrees must be affirmed.

Ordered accordingly.

* The ruling referred to as made by the master was "that the degree of care required of the defendant in wrecking the buildings after November 9, 1911, was such care as men of ordinary prudence would have used under the same circumstances and having regard to the matter in which the defendant was engaged."

ELLA CONLEY vs. UNITED DRUG COMPANY.

Norfolk. March 27, 1914. — June 16, 1914.

Present: RUGG, C. J., HAMMOND, SHELDON, DE COURCY, & CROSBY, JJ.

Negligence, Fright accompanied by physical injury, In guarding explosives, Res ipsa loquitur. Actionable Tort. Evidence, Presumptions and burden of proof.

It seems that if a girl is at work in a shop and an explosion occurs so violent as to splinter and rip up the floor and throw bottles about the room and break them, and the girl thereupon faints and cannot remember that she was struck by anything or was thrown down, but on an examination made after the accident a physician finds bruises on her body which could have been caused by a fall or by being thrown violently against some object in the room, the girl has a cause of action against a person whose wrongful act or negligence caused the explosion, although the principal injuries suffered by her were due to fright, there being evidence of accompanying physical injury.

It seems that, if a girl is so frightened by an explosion that she faints and falls unconscious to the floor, where she sustains some physical injury, she has a cause of action against a person who wrongfully caused the explosion.

In an action for personal injuries from an explosion caused by the bursting of a cylindrical steel tank filled with carbonic acid gas, proof of the fact, that the explosion occurred in the basement of a building owned and, with the exception of the first floor, occupied by the defendant as a factory, is not evidence for the jury of the defendant's liability, where there is nothing to show that at the time of the explosion the tank was in the defendant's custody or control, or to show how it happened to be in the basement of the defendant's building or how long it had remained there, and where also there is no evidence that such tanks or their contents were manufactured, used or dealt in by the defendant in connection with his business, nor any evidence to show the nature of that business or to show that the defendant had any reason to believe that the tank was on his premises until after the explosion had occurred.

The right of a jury to disbelieve a defendant's denial of the existence of a fact essential to the plaintiff's case does not furnish the plaintiff with evidence of that fact.

In an action for personal injuries the rule of *res ipsa loquitur* is not applicable unless the defendant had control of the thing that caused the injury.

TORT for personal injuries sustained on November 6, 1911, when the plaintiff was engaged in the performance of her duties as an employee of the United Perfume Company, by reason of an explosion that occurred in the basement of the building numbered 63 on Leon Street in Boston "where the defendant carried on its business," the first floor of the building being occupied by the

plaintiff's employer as a tenant of the defendant, which owned the building and occupied the other floors and the basement. Writ dated November 24, 1911.

In the Superior Court the case was tried before *McLaughlin, J.*, who at the close of the plaintiff's evidence, which is described in the opinion, refused to order a verdict for the defendant, and it was agreed by the parties that the plaintiff's damages should be assessed at \$600 and that, if there was evidence to submit to the jury, the judge should find for the plaintiff, both parties waiving a jury trial, and should report the case to this court. The judge accordingly found for the plaintiff in the sum of \$600; and reported the case for determination by this court. If it would have been proper to submit the case to the jury, judgment was to be entered for the plaintiff in this sum, with interest from the date of the finding; otherwise, judgment was to be entered for the defendant.

The case was submitted on briefs.

E. C. Stone, for the defendant.

H. C. Haskell, for the plaintiff.

CROSBY, J. This is an action brought by a minor, by her next friend, for physical injuries alleged to have been received by her by reason of the explosion of a cylindrical tank. This tank was about four feet long and seven inches in diameter, and contained liquid carbonic acid gas. The explosion occurred in the basement of a building owned and, with the exception of the first floor, occupied by the defendant as a factory. The plaintiff was employed by the United Perfume Company, which occupied the first floor of the building.

1. The defendant contends that the plaintiff's injuries were due wholly to fright, and that she is precluded from recovery under the rule established in the case of *Spade v. Lynn & Boston Railroad*, 168 Mass. 285. The jury would have been warranted in finding upon the evidence that the explosion was so severe as to cause the floor near where the plaintiff and other girls were at work to be splintered and ripped up, that bottles were thrown about the room and broken, and that the girls who were employed on this floor with the plaintiff were greatly excited and endeavored to escape. The plaintiff testified that she did not recall that she was struck by anything or that she was thrown down, but that

she fainted and did not recollect anything thereafter until she found herself at her home. There was also evidence that she was examined by a physician on the morning after the explosion; that this examination "disclosed tenderness on the plaintiff's right side, shoulder and hip, and some days later a slight discoloration developed on the shoulder and side, and there was a mark over her right shoulder and another near her hip." The physician testified that these injuries could have been caused by a fall or by being thrown violently against some object in the room. In view of the effect of the explosion upon the plaintiff and the fear and fright caused thereby, a jury might find, notwithstanding the absence of direct testimony to that effect, that she was thrown to the floor or against some object and so received the physical injuries described. Upon such a finding, manifestly the rule laid down in *Spade v. Lynn & Boston Railroad, ubi supra*, would not be applicable. If, as the defendant contends, the physical injuries which the plaintiff received were due to her falling upon the floor when by reason of fright she fainted and became unconscious, still we are of opinion that the rule adopted in *Spade v. Lynn & Boston Railroad* does not apply. We think that if the effect of the excitement and fright under which the plaintiff labored was to cause her to faint and fall to the floor and thereby sustain physical injuries, she would not be barred from recovery. The distinction between the case at bar and the *Spade* case lies in the fact that in that case, unlike the present case, there was no evidence of physical injury, and for that reason it was held "that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury." *Spade v. Lynn & Boston Railroad*, 168 Mass. 285, 290. *Gannon v. New York, New Haven, & Hartford Railroad*, 173 Mass. 40. *Berard v. Boston & Albany Railroad*, 177 Mass. 179. *Homans v. Boston Elevated Railway*, 180 Mass. 456, 458. *Cameron v. New England Telephone & Telegraph Co.* 182 Mass. 310. *Driscoll v. Gaffey*, 207 Mass. 102.

2. Without question the plaintiff was physically injured as the result of the explosion and while she was in the exercise of due care. Proof of these facts alone, however, are not sufficient to entitle her to recover. In addition some evidence of negligence on the part of the defendant must appear in order that it may be

charged with liability. The negligence charged is in substance that the defendant so negligently kept, used and employed on its premises certain chemicals that an explosion occurred whereby the plaintiff was injured. The undisputed evidence shows that the explosion was caused by the bursting of a cylindrical steel tank filled with carbonic acid gas, and that at the time of the explosion this tank was upon the defendant's premises. It is plain that the mere fact of the explosion of the tank upon the defendant's premises is not sufficient to charge it with negligence. In other words, the defendant's liability cannot be established by proof of the explosion alone. To charge the defendant with negligence there must be some evidence (aside from the presence of the tank on the defendant's premises at the instant of the explosion) to show that it was at that time in its custody and control.

In our opinion, there was an entire absence of such evidence. The defendant's superintendent, in answer to interrogatories, stated that he did not know the cause of the explosion, that the tank was not rightfully on the premises at that time, and was not handled by any employee or other agent of the defendant, and that it was not being handled under his immediate personal supervision. But the jury might not have believed this evidence. Yet the superintendent's denial that the tank was rightfully on the premises would not furnish evidence that it was rightfully there, or in the custody or control of the defendant. All that the evidence presented shows is that the tank at the moment of the explosion was upon the defendant's premises. How it happened to be there, whether rightfully or otherwise, and how long it had remained there does not appear; nor is there any evidence to show that such tanks or their contents were manufactured, used or dealt in by the defendant in connection with its business. There is no evidence to show the nature of the business the defendant was engaged in, and nothing to show that it knew or had any reason to believe that the tank was on its premises until after the explosion occurred. Under these circumstances, there is no evidence to warrant a finding that the defendant had any control over it, or was in any way responsible for its presence. *Kendall v. Boston*, 118 Mass. 234. *McIntire v. Roberts*, 149 Mass. 450. *McGee v. Boston Elevated Railway*, 187 Mass. 569. *Saxe*

v. *Walworth Manuf. Co.* 191 Mass. 338. 29 Cyc. 477, 478. See also *McNicholas v. New England Telephone & Telegraph Co.* 196 Mass. 138.

The rule of *res ipsa loquitur* cannot be held to apply in this case because it never is applicable unless the defendant has control of the agency which causes the injury.

It follows that judgment must be entered for the defendant in accordance with the terms of the report.

So ordered.

ELLEN T. O'NEIL vs. MICHAEL M. TOOMEY.

Essex. May 18, 1914. — June 16, 1914.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Evidence, Matters of common knowledge, Presumptions and burden of proof. Negligence, Res ipsa loquitur.

It is a matter of common knowledge, of which the court takes judicial cognizance, that ice is a hard, brittle and slippery substance, and that a cake of it when being carried is likely to fall and break unless handled carefully.

Where it appears in evidence that a cake of ice, when being carried by a retail ice dealer with ice tongs over his shoulder through the doorway of a kitchen for delivery to a customer, fell to the floor and injured the customer, and where the cause of the fall is not explained, a jury can find that the accident would not have occurred without fault on the part of the defendant and may infer negligence from its happening.

CROSBY, J. The defendant, who was a retail ice dealer, carried a cake of ice into the plaintiff's kitchen for the purpose of leaving it in an ice chest, when it fell, striking the plaintiff's hand and causing the injuries for which this action was brought. The ice, which the defendant held with ice tongs in his right hand over his right shoulder, weighed about fifty pounds and was carried on his back. In delivering the ice he passed through a screen door which opened into an enclosed porch, and thence through the kitchen door into the kitchen. The porch door opened outward; the kitchen door opened inward and swung to the left of a person entering from the porch into the kitchen. The

only witnesses who testified at the trial were the plaintiff and the defendant.

The plaintiff testified that when the defendant came to deliver the ice the screen door was closed and the kitchen or inner door was open; that she "had been inside the house some minutes before the defendant came, and was seated on a chair close to the wall of the kitchen, and about two or three feet from the edge of the kitchen door as it stood open;" that she "was stooping forward in the act of removing a rubber from her right foot;" and that "as the defendant entered the kitchen the cake of ice struck something that sounded like wood and was knocked from the defendant's back and fell upon . . . [her] hand, badly crushing it."

The defendant testified that when he went to the house the plaintiff was ahead of him, coming out of the garden; that both doors were closed; that the plaintiff preceded him into the house and opened both the screen door and the kitchen door, and that when she was struck by the cake of ice she was sitting in a chair in the kitchen; that as he passed into the porch he held the screen door open with his left hand, and as he was passing through the doorway into the kitchen the door "came to and hit this ice and she was seated in the chair someway there, and the door knocked the ice out of the tongs and hit the floor and hit her hand some way, I don't know how." The defendant also testified that the plaintiff asked him how the ice slipped, and that he told her "that she let the door hit the ice."

The jury viewed the plaintiff's house. "It was agreed that the things seen by them should be affirmative evidence." The presiding judge * ordered a verdict for the defendant upon the ground that there was not sufficient evidence to authorize a finding that the defendant was negligent. The plaintiff excepted to this ruling, which presents the only question before us.

The defendant's story as to the cause of the accident, if believed by the jury, would have warranted the ruling made. Still the jury might not have believed it, and, considering all the evidence, including the proper and reasonable inferences to be drawn therefrom, they might have found, as testified to by the plaintiff, that when the defendant entered the house the screen

* *Hitchcock, J.*

door was closed, that the kitchen or inner door was open, and that the plaintiff "had been inside the house some minutes before the defendant came."

In view of this testimony the jury also might have found that the plaintiff did not open the kitchen door for the defendant, and that in entering the kitchen the defendant carelessly allowed the ice to strike the door jamb, or to come in contact with the door. It is a matter of common knowledge that ice is a hard, brittle and slippery substance, and is liable to break and fall in carrying unless handled carefully.

If the precise cause of the fall was unexplained, yet the jury could have found from their experience as men of the world with a knowledge of ordinary affairs, that such an accident commonly does not happen unless cakes of ice are carelessly handled.

If the accident was not explained, a finding would have been warranted that in ordinary experience it would not have occurred without fault on the part of the defendant. The doctrine of *res ipsa loquitur* applies in the case of an unexplained accident which, in the ordinary experience of mankind, would not have happened without fault on the part of the defendant. In such a case negligence may be inferred from the happening of the accident. *Manning v. West End Street Railway*, 166 Mass. 230, 231. *Beattie v. Boston Elevated Railway*, 201 Mass. 3. *McNamara v. Boston & Maine Railroad*, 202 Mass. 491.

In *Kaples v. Orth*, 61 Wis. 531, the plaintiff was sitting on a stairway when a servant of the defendant, an ice dealer, carrying a cake of ice dropped it upon the plaintiff's hand. It was held that negligence might be inferred from the happening of the accident.

While the case is close we are of opinion that a verdict should not have been ordered for the defendant, but that the question of liability was for the jury.

Exceptions sustained.

The case was submitted on briefs.

R. E. Burke & E. E. Crawshaw, for the plaintiff.

E. I. Taylor & J. W. Britton, for the defendant.

JOSEPH J. FLYNN vs. RICHARD T. HOWARD.

Suffolk. May 18, 1914. — June 16, 1914.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & CROSBY, JJ.

Assignment. Evidence. Of Assignment, Competency, Presumptions and burden of proof. *Judgment. Practice, Civil,* Equitable defense, Order of proof.

In an action by a judgment creditor against one of three who were the judgment debtors, if the plaintiff alleges in the writ and declaration that he brings the action for the benefit of another person, who was an assignee of the judgment, and the defendant alleges and introduces evidence tending to show that one of the judgment debtors other than the defendant had paid for and was the real owner of the judgment, the assignee being merely the nominal owner, evidence as to the amount, nature, time and place of payment of the consideration of the assignment is admissible, and the burden is upon the plaintiff to prove, not only that the defendant owed the amount of the judgment, but also that the assignment to the person for whose benefit the action was brought was valid, and that the amount of the judgment was due to him.

In such action it is improper to exclude a record of the Superior Court, which the plaintiff offers to introduce in evidence at the close of his own case and again at the close of the cross-examination of the defendant and which shows that the defendant brought a suit in equity against the assignee of the judgment and the person whom the defendant alleged was the real owner of the judgment by assignment, seeking to have the action at law enjoined on the grounds set up in his answer in the action at law, and that the suit was heard by a judge, who, having found that the person named as assignee was the real owner of the assignment, caused a decree to be entered dismissing the suit from which no appeal was taken; because the evidence is offered seasonably and is competent upon the issue raised by the answer.

CONTRACT upon a judgment, the plaintiff alleging in the writ that he brought the action for the benefit of one Daniel C. Fletcher, assignee. Writ in the Municipal Court of the City of Boston dated March 12, 1912.

On appeal to the Superior Court, the case was tried before Bell, J. The plaintiff introduced a certified copy of a record of a judgment in the Superior Court, which showed that on December 14, 1906, the plaintiff recovered judgment in an action of contract for \$700.55 against one John J. Walsh, one H. Theodore Fletcher and the defendant in this action.

The only other witness for the plaintiff was H. Theodore Fletcher.

Other material evidence is described in the opinion.

At the close of the evidence, the plaintiff asked the judge to rule as follows:

"1. On all the evidence the plaintiff is entitled to a verdict for the amount of the judgment, with interest to date."

"3. The only question is, does the defendant owe the amount of the judgment?"

The judge refused to give such rulings. There was a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

C. W. Cushing, for the plaintiff.

J. Comerford, for the defendant.

CROSBY, J. This is an action brought for the benefit of Daniel C. Fletcher, to recover the amount of a judgment rendered in the Superior Court in favor of the plaintiff Flynn against the defendant and John J. Walsh and H. Theodore Fletcher.

The plaintiff in his declaration alleges that while the original action was pending in the Superior Court he, in writing, assigned to Daniel C. Fletcher the cause of action mentioned therein and that "this action is brought for the use and benefit of said Daniel C. Fletcher." It therefore appears that the plaintiff Flynn is only nominally a party, and that the real party interested in recovering the amount of the judgment is the assignee Fletcher.

The defendant's amended answer alleges that "one H. Theodore Fletcher, who is a co-judgment debtor with himself and John J. Walsh, and upon which judgment this suit is based, paid for and is the equitable owner of said judgment though carrying the same in the name of Daniel C. Fletcher by assignment from Joseph J. Flynn."

The defendant contends that H. Theodore Fletcher paid for and is the equitable owner of the judgment, although the assignment was made to Daniel C. Fletcher, and that the latter has no interest either legal or equitable in the judgment.

1. In view of the issue raised by the pleadings as to whether Daniel C. or H. Theodore Fletcher was the real owner of the judgment under the assignment, evidence as to the consideration for the assignment, the amount thereof, the time and place of

payment and the other circumstances admitted in evidence, was all competent, and the plaintiff's exception to the admission of this evidence must be overruled.

2. The plaintiff's first request could not have been given. The burden was upon the plaintiff to prove his case, including proof of the validity of the assignment to Daniel C. Fletcher. This was a question for the jury upon all the evidence, including the reasonable inferences to be drawn therefrom.

3. The plaintiff's third request was rightly refused. Whether the defendant owed the amount of the judgment was a question involved in the case, but it was not the only one. It was for the jury also to determine whether the amount was due to Daniel C. Fletcher as assignee.

4. We are of opinion that the record in the equity suit should have been admitted in evidence, and that because of its exclusion by the judge the exceptions must be sustained. The bill in that suit was brought by this defendant against Daniel C. Fletcher and H. Theodore Fletcher, and alleged in substance that the "consideration for said assignment was paid for by H. Theodore Fletcher by his own money; and that H. Theodore Fletcher is the equitable owner of said judgment." The suit in equity was between the same parties upon the same issue as that raised in this case. The finding of the judge in that suit, which was in effect that Daniel C. Fletcher purchased the judgment with his own money and that H. Theodore Fletcher was not the equitable owner of the judgment, together with the entry of a final decree dismissing the bill, from which no appeal was taken, is conclusive and binding upon the parties in this action. The issue decided in the equity suit was identical with that raised by the amended answer in the case at bar. *Saco Brick Co. v. J. P. Eustis Manuf. Co.* 207 Mass. 312, 315, 316. *Newburyport Institution for Savings v. Puffer*, 201 Mass. 41. *Corbett v. Craven*, 193 Mass. 30. Nor was the record in the suit in equity incompetent upon the ground that it was not seasonably offered. It was a part of the plaintiff's proof and was first offered by him as a part of his case "at the close of the cross-examination of H. Theodore Fletcher, who was the sole witness for the plaintiff." The record shows that the plaintiff renewed his offer during the cross-examination of the defendant, and the evidence was again

excluded. The evidence was competent and was seasonably offered. Because of its exclusion the entry must be

Exceptions sustained.

EMMA F. TAYLOR vs. WILLIAM A. STOWE.

Worcester. May 22, 1914. — June 16, 1914.

Present: RUGG, C. J., LORING, BRALEY, DE COURCY, & CROSBY, JJ.

Marriage and Divorce, Alimony. Judgment. Conflict of Laws.

In a proceeding for a divorce brought by a wife in the State of Maine, in which the husband appeared by his attorney, a decree was entered, granting the divorce, giving to the libellant the custody of minor children, ordering the libellee to pay to her a certain amount per week till further order of the court, and ordering that, in default of any of such payments for the space of two months, an execution was "to issue therefor." Within a year thereafter the libellant married another man. More than four years after the decree the libellant, after filing an affidavit which was customary in such cases and without any notice to the libellee, was granted an execution for four years' arrears of alimony and brought an action therefor in this Commonwealth. The Revised Statutes of Maine, c. 62, § 11, provides that when either of the parties in such a proceeding "has contracted a new marriage since the former trial, a new trial may be granted as to alimony or specific sum decreed, on such terms as the court may impose and justice require, when it appears that justice has not been done through fraud, accident, mistake or misfortune." The libellant had not asked for a new trial under that statute. *Held*, that, in the absence of a modifying decree made under the statute, the former decree was in force; that the application for an execution was merely incidental to the original suit, so that no new notice to the defendant was necessary, and that, therefore, under the full faith and credit clause of the Constitution of the United States, the decree must be given effect in this Commonwealth, and judgment must be entered for the plaintiff.

DE COURCY, J. By the Supreme Judicial Court of Maine a divorce was decreed to Emma F. Stowe (now Emma F. Taylor and the plaintiff in this action) on April 28, 1899, and the custody of the minor children was given to her. The decree also recited: "It is further ordered and decreed that the libellee pay to the libellant the sum of three dollars per week, payable monthly, till further order of court, and in default of any of said payments

for the space of two months, an execution is to issue therefor." It is admitted that the husband (the present defendant) appeared by attorney in the divorce proceeding.

On August 30, 1899, an execution was issued in her favor for the sum of \$51, being the arrears of alimony to August 25. She was married to her present husband September 20, 1899. On September 12, 1913, on the application of the libellant, supported by an affidavit in accordance with the custom in that State, there was issued to her another execution for \$2,184, being the alimony that had accrued from August 25, 1899, to August 25, 1913. The present action is brought in our courts to recover this latter sum.

It is provided by c. 62, § 11, of the Revised Statutes of Maine that "when either of the parties has contracted a new marriage since the former trial, a new trial may be granted as to alimony or specific sum decreed, on such terms as the court may impose and justice require, when it appears that justice has not been done through fraud, accident, mistake or misfortune." The main contention of the defendant is that by reason of this provision the decree of the Maine court as to alimony became subject to revision on the remarriage of the plaintiff, and that therefore it is not such a final decree as comes within the "full faith and credit" clause of the Federal Constitution.

It is now settled that "generally speaking, where a decree is rendered for alimony and is made payable in future instalments, the right to such instalments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the instalments." *White, J., in Sistare v. Sistare*, 218 U. S. 1, 16. In the case of *Page v. Page*, 189 Mass. 85, relied on by the defendant, the demurrer was sustained because it did not appear that the plaintiff had obtained a final decree in Maine. The mere fact that the statute gave the defendant a right to apply for a new trial as to alimony when the plaintiff contracted a new marriage, does not, in our opinion, deprive the decree of its final character. Unless and until such application is filed and it is made to appear that "justice has not been done through fraud, accident, mistake or misfortune," the original decree remains, unmodified and in

full force and effect. This renders it unnecessary to consider the right of the defendant to apply for a new trial after the three years mentioned in the statute. And it appears from the case of *Stratton v. Stratton*, 73 Maine, 481, referred to in the agreed facts, that the Maine court has no authority, except in cases specified by the statute, to modify an absolute decree for alimony once rendered.

It is further contended by the defendant that there was no final judgment in Maine represented by the execution annexed to the plaintiff's declaration. This objection seems to us untenable. Chapter 62, § 14, of the Revised Statutes of Maine expressly provides that the court, in the execution of the powers given to it in that chapter, "may employ any compulsory process which it deems proper, by execution, attachment or other effectual form." On August 25, 1913, monthly instalments that had accrued since August 25, 1899, were due and unpaid; and proof of that fact was furnished to the court by the customary affidavit of the libellant when she filed her application for the execution. This was in accordance with the established practice in Maine. *Prescott v. Prescott*, 62 Maine, 428. To the defendant's objection that no notice of this application was served on him or on his attorney of record, the language of Appleton, C. J., in the Prescott case (page 430) is applicable: "There was no occasion to issue a rule on the libellee, for he was in court by his counsel, and it being shown satisfactorily to the court, that monthly instalments due remained unpaid, the libellant was entitled to an execution for the amount." The application for an execution was not a new or independent proceeding, but was merely incidental to the original suit, in which the defendant appeared by counsel after due service of the libel. *Wells v. Wells*, 209 Mass. 282.

The defendant became indebted to the plaintiff for the instalments of alimony as they accrued. The decree was an enforceable judgment in the State where it was rendered; and, at the latest, after execution was issued, it was not open to revision. Our duty to give effect to it clearly results from the full faith and credit clause of the Federal Constitution. *Sistare v. Sistare*, 218 U. S. 1, 16.

It follows that judgment must be entered for the plaintiff in

the sum of \$2,323.78, which is the amount found due by the judge of the Superior Court.*

So ordered.

The case was submitted on briefs.

G. S. Taft & J. J. MacCarthy, for the defendant.

S. Bishop, for the plaintiff.

FRANK M. HOOPER *vs.* BAY STATE STREET RAILWAY COMPANY.

Essex. November 6, 1913. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, SHELDON, DE COURCY,
& CROSBY, JJ.

Negligence, Street railway. *Evidence*, Contradictory statements of witness.

If, when a passenger is alighting from the front vestibule of a closed street railway car while it is in motion, a raincoat which he is wearing becomes caught in the door so that he is in danger of being injured, and this fact is called to the motorman's attention, it is the motorman's duty to stop the car in order to prevent injury to the passenger.

At the trial of an action against a street railway company for personal injuries alleged to have been caused when the plaintiff's raincoat caught in the front door of the vestibule of a closed car of the defendant as he was alighting from the car when it was in motion, so that he was dragged by the car and run over, the plaintiff testified in substance that he ran beside the car before he fell about one hundred feet, shouting continuously. No person testified that he had heard the continuous shouting. A witness in a nearby building testified that he heard one "holler." A passenger in the front vestibule, who was called as a witness by the plaintiff, was not questioned on the point. Another passenger in that vestibule and the motorman both testified that they heard no shouting. *Held*, that there was no evidence to warrant a finding that the motorman heard or ought to have heard the shouting.

In an action against a street railway company for personal injuries caused by the plaintiff's raincoat being caught in the door of the front vestibule of a closed car of the defendant as he was alighting when the car was going about four miles an hour, causing him to fall, be dragged and run over when the speed of the car was increased, if it appears that, as the plaintiff jumped from the car a passenger standing beside the motorman told him in a sharp commanding voice and vigorous language that he had better stop the car to see where "that fellow went to," and that the motorman merely shut off the power and applied the brake, it is not evidence of negligence on his part that he did not also reverse the power, which he knew would have stopped the car sooner.

* *Wait, J.*

Where, in an action against a street railway company for personal injuries alleged to have been caused by negligence of a motorman in not stopping a closed car of the defendant from which the plaintiff was alighting while it was in motion when a raincoat which the plaintiff was wearing caught in the door of the vestibule, there is evidence that, when the plaintiff alighted, the car was going only four miles an hour, but that almost immediately, and while the plaintiff was running beside it, its speed was increased until he could no longer keep his footing, and he fell, was dragged and was run over, if a witness for the plaintiff who was in the front vestibule testifies in substance that, when the plaintiff jumped, he, the witness, spoke to the motorman in a "kind o' sharp, quick and commanding tone of voice," saying, "You better a damn sight stop the car as soon as you can to see where in hell that fellow went to," and that thereafter the car ran "about sixty-five paces rather short" before it came to a stop, although in cross-examination the same witness states that the car went only a car length after he spoke to the motorman, the jury are warranted in finding that after the witness spoke to the motorman the car continued for one hundred and seventy-five feet, and that the motorman was negligent.

TORT for personal injuries received when the plaintiff's raincoat was caught in the door of the front vestibule of a closed electric street car of the defendant as he was in the act of leaving the car while it was in motion, causing him to be dragged and to be run over by the car. Writ dated November 4, 1911.

In the Superior Court the case was tried before *Ratigan, J.* The material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in November, 1913, before *Rugg, C. J., Morton, Loring, Braley, & De Courcy, JJ.*, and afterwards was submitted on briefs to all the justices then constituting the court.

J. Lowell & L. Hill, for the plaintiff.

M. L. Sullivan, (J. J. Ronan with him,) for the defendant.

LORING, J. The facts in this action were substantially as follows: The plaintiff undertook to alight from one of the defendant's cars without notifying the conductor or motorman that he wished to do so. He had been riding on the front platform, standing behind the motorman and between two other passengers, Glass and Davis by name. Glass was on his left and Davis on his right. The car had come down Lafayette Street in the city of Salem, and slowed down to go round a curve into New Derby Street, which runs nearly at a right angle. As the car came to the curve

and before it entered upon it (as the plaintiff testified), or when it reached the centre of the curve (as one of his witnesses testified), the plaintiff, thinking that it was going to stop, told Davis that he was going to get off. Thereupon Davis stepped forward beside the motorman, the plaintiff opened the door of the vestibule, swung the door to and stepped off. He had on a raincoat which was buttoned up. As he stepped off, the coat caught "in the door which had become closed." He ran along with the car trying to free his coat and "shouting continuously at the motorman." When the car had "made" the curve it was going at the rate of some four miles an hour, and then the motorman returned to a faster speed. When the car returned to the faster speed, the plaintiff, being unable to keep up with it, fell and his leg was caught under the rear truck. The plaintiff's counsel assumed that the car was twenty-six feet long, as testified to by one of the defendant's witnesses. The plaintiff testified that he ran two car lengths (that is, fifty-two feet) before he shouted, four car lengths (that is, one hundred and four feet) while he was "shouting," and that he was dragged two more (that is, fifty-two feet) after he fell. The testimony given by other witnesses called by the plaintiff did not entirely agree on the distances. But the distances given by the plaintiff were as favorable as those given by the other witnesses.

The first ground on which the plaintiff contends that the jury were warranted in finding negligence on the part of the defendant is that from the fact that Davis stepped forward beside the motorman (at the time the plaintiff passed behind Davis to alight), the motorman ought to have known that the plaintiff was intending to alight although he had not taken the trouble to give him notice of his intention to do so. We doubt whether that is so, because it is the duty of a motorman to concentrate his attention on the street before him in order to avoid collisions with automobiles, wagons and foot passengers, who have equal rights in it. *Kiley v. Boston Elevated Railway*, 207 Mass. 542. *Brightman v. Union Street Railway*, 216 Mass. 152. But we do not find it necessary to come to a decision on that fact because it appears that the company had regular stopping places marked by white posts, and the place where the plaintiff undertook to alight was not at a stopping place.

Of course it would have been the motorman's duty to come to

a stop if he had known of the danger that the plaintiff was in by reason of the door having shut to on his coat. The plaintiff has contended that the jury were warranted in finding negligence on the part of the motorman in not coming to a stop before he did, because on the evidence they could have found that he did hear or ought to have heard the "continuous shouting" testified to by the plaintiff, while he was running by the car for one hundred feet. But no witness was produced who heard this continuous shouting. And among the witnesses who testified were the plaintiff's fellow passengers on the front platform, Glass and Davis. Davis was put on the stand by the plaintiff and was not questioned on this point. Glass, called by the defendant, testified that he did not hear it; and so did the motorman. The one "holler" testified to by a coachman standing inside the door of a livery stable could not have been found to refer to the continuous shouting testified to by the plaintiff. From the coachman's testimony taken as a whole it is plain that the one "holler" testified to by him was the cry (testified to by other witnesses) given by the plaintiff when his leg was struck by the rear truck. Under these circumstances any shouting by the plaintiff must be taken to have been drowned by the noise of the operation of the car and other noises of the street, and a finding that the motorman did hear or ought to have heard it was not warranted.

We are of opinion that a finding of negligence was not warranted by the fact that, when spoken to by Davis, the motorman, in place of applying the reverse power, shut off the power and applied the brakes.

But we are of opinion that the testimony given by Davis on his direct examination entitled the plaintiff to go to the jury. On his direct examination Davis testified that the plaintiff "started to jump" "just as the car got about in the dead centre of the curve" at the junction of Lafayette and New Derby Streets. That he "then" spoke to the motorman and told him to stop "as quick as he could to see where that fellow went to." "I said, 'You better a damn sight stop the car as soon as you can to see where in hell that fellow went to'" "[I] said this in a 'kind o' sharp, quick and commanding' tone of voice." But (so this witness testified) the car went "about sixty-five paces 'rather short,'" before it came to a stop. If a "rather short" pace be taken to

be two and three quarters feet, the jury were warranted in finding that the car went one hundred and seventy-five feet after Davis spoke to the motorman. It is true that on cross-examination this same witness testified that "the car went a length in all after the witness spoke to the motorman." The two statements are contradictory, and it was for the jury to decide between them. *Tierney v. Boston Elevated Railway*, 216 Mass. 283. If the jury believed the testimony given by Davis on his direct examination, they were warranted in finding that the motorman in effect had been told that the "fellow" who had undertaken to alight was in danger; that the situation was urgent and required the immediate stopping of the car. If this was so, they were warranted in finding that the motorman was negligent in not bringing the car to a stop before he did, that is to say, before it had gone one hundred and seventy-five feet after he thus was spoken to by Davis.

Exceptions sustained.

LULU EMERY vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 21, 1913. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, SHELDON, DE COURCY,
& CROSBY, JJ.

Negligence, In use of highway, Street railway, Violation of rule. *Evidence*, Negative testimony, Of failure to sound gong.

In an action by a woman against a street railway company for personal injuries caused by the plaintiff being struck by the drip rail of a street car of the defendant as she was crossing a street from behind another car bound in the other direction on a parallel track, it appeared that the inner rails of the tracks were four feet eight and one half inches apart, that the overhang of each car was eighteen inches, and that the drip rail protruded beyond the overhang. The plaintiff testified that she had just alighted from a closed car, which jutted out and obstructed her view, that as she passed behind it she stopped and listened, having in mind rules of the defendant which required motormen to sound gongs and to run slowly in passing a stationary car, that she heard no gong or sound at all, that she "stepped out in the direction" of the other track, when she saw a car coming on the other track "very fast, as fast as she ever saw cars go when they had a clear road," that she "had no time hardly to think, . . . only time to jump back as quickly and as hard as she could," and that the drip rail struck

her. A witness for the defendant, who was a passenger on the car that struck the plaintiff, testified that the plaintiff "stepped one step out" as that car approached. *Held*, that the jury were warranted in finding that the plaintiff was in the exercise of due care.

In an action against a street railway company for personal injuries caused by the plaintiff being struck by a car of the defendant as she was crossing a street from behind a car bound in the opposite direction from which she just had alighted, evidence tending to show that the motorman of the car which struck the plaintiff was violating rules of the defendant which required him to run slowly and to sound a gong when passing a stationary car will warrant a finding that the motorman was negligent.

Testimony, that a woman, who was crossing a street railway track from behind a street car from which she just had alighted, having in mind a rule of the company which operated cars on the tracks requiring that a gong should be sounded by the motorman of a car passing a stationary car, stopped and listened and heard no gong, will warrant a finding that no gong was sounded by a car which approached rapidly on the track that she was crossing and struck her.

TORT for personal injuries caused by the plaintiff being struck by a street railway car of the defendant as she was crossing a street from behind another street car bound in the opposite direction. Writ dated June 11, 1912.

In the Superior Court the case was tried before *Keating, J.* The material evidence is described in the opinion. The judge refused to order a verdict for the defendant. There was a verdict for the plaintiff in the sum of \$3,000; and the defendant alleged exceptions.

The case was argued at the bar in November, 1913, before *Rugg, C. J., Hammond, Loring, Braley, & De Courcy, JJ.*, and afterwards was submitted on briefs to all the justices.

F. W. McGettrick, for the defendant.

J. D. Graham, for the plaintiff.

LORING, J. The only serious question here is whether the jury were warranted in finding that the plaintiff was in the exercise of due care. The facts which they were warranted in finding were in substance as follows: The car from which the plaintiff had just alighted was a closed car and it jugged out so as to take away her view. For that reason when she passed behind it she stopped and listened, having in mind that under the defendant's rules motormen were required to sound their gongs and run slowly by stationary cars. Hearing no gong or "any sound at all, . . . she then stepped out in the direction" of the other track, saw a car coming on the other track "going very fast,

as fast as she ever saw cars go when they had a clear road; . . . she had no time hardly to think; . . . she had only time to jump back as quickly and as hard as she could" (to quote her own testimony), when the drip rail of the other car struck her and broke her arm. It appeared that the space between tracks was four feet eight and one half inches, and that the overhang of each car "was eighteen inches at least." This left twenty and one half inches or less in the clear between the bodies of the cars, and the drip rail which struck the plaintiff protruded into this space.

There was direct evidence that the plaintiff took "one step out, . . . as this car was coming to the point."* One step forward from the side line of the car she was leaving brought her into or beyond the side line of the passing car. The jury were well warranted in finding that at the very second or fraction of a second when the plaintiff took that one step forward she was confronted by the passing car, which was rushing by at an excessive rate of speed and without warning. We say at the very second or fraction of a second because ordinarily it takes less than a second to make a step forward. The defendant has insisted upon the fact that the plaintiff did not testify that as she stepped forward she looked. But if the circumstances were found to be those just stated, she did not have to look to see the car. It rushed upon her at the very second that she emerged from behind the vestibule of the car she was leaving. If the plaintiff had known and appreciated that the one step forward would have brought her into the zone of danger, perhaps it might be held to have been negligent for her to take that one step. But the plaintiff is not chargeable with knowledge of that fact. Unless it can be said that as matter of law the plaintiff was bound either to have waited until her own car had passed on, or to have held back and peeked around the vestibule of the car she alighted from before taking one step forward, it cannot be said that as matter of law she was negligent.

In *Kennedy v. Worcester Consolidated Street Railway*, 210 Mass. 132, much relied on by the defendant, the plaintiff stepped on to the farther track, was hit by the front end of the passing car and thrown under the wheels. Under those circumstances he had an opportunity to see the car if he had looked before he stepped

* A witness for the defendant, who was a passenger on the car, so testified.

between the rails of the track, but he did not do so. In addition the car from which the plaintiff in that case alighted was an open one, and for that reason his view was not wholly obstructed. In our opinion the case is more nearly like *Purcell v. Boston Elevated Railway*, 211 Mass. 79, where the plaintiff, a girl six and one half years old, listened from behind the stationary car, and where it was held that the jury were warranted in finding that she knew of the rule or custom to sound the gong under the circumstances, and that she relied upon the fact that it was not sounded.

There was evidence of the defendant's negligence in the violation by the motorman of the rule to run slowly and sound the gong when passing a stationary car. *Stevens v. Boston Elevated Railway*, 184 Mass. 476. There was evidence that the gong was not rung under the rule explained in *Slattery v. New York, New Haven, & Hartford Railroad*, 203 Mass. 453.

In the opinion of a majority of the court the entry must be
Exceptions overruled.

MARY E. HARTNETT, administratrix, vs. REUBEN B. GRYZMISH.

Suffolk. December 8, 1913. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Agency, Scope of employment. Evidence, Presumptions and burden of proof, Of state of mind.

In an action for the conscious suffering of one who was run over by an automobile of the defendant, there was evidence tending to show merely that a chauffeur who was driving the automobile at the time of the accident was employed by the defendant and "took orders from everybody in the" defendant's family, that at the time of the accident he had been in the car to his home for a noon dinner and was proceeding from his home to the residence of the defendant, which was a mile beyond the place where the accident occurred, to take out the defendant's mother, that the defendant had not told him to use the automobile for the purpose of going to his dinner or for similar purposes, and that he never had told the defendant that he so used it and did not know that the defendant was aware of the fact that he did so. The assistant superintendent of the garage where the automobile was kept testified that "there was no limitation so far as the garage was concerned as to the rights of" the chauffeur "to take out the car at any time." The terms of the contract between the defendant and the chauffeur were not in evidence. *Held*, that there was no evidence

that the chauffeur was acting within the scope of his employment by the defendant at the time of the accident, because the only reasonable inference from the evidence was that the chauffeur was to procure his own meals, and that the time required to do so was his and not the defendant's.

In an action for personal injuries caused by an automobile of the defendant, where it appears that the defendant was not in the automobile at the time of the accident, the mere facts, that the defendant owned the car and that it was being driven by a chauffeur who was hired by him, do not warrant a finding that at the time of the accident the chauffeur was acting within the scope of his employment by the defendant.

At the trial of an action for personal injuries caused by an automobile of the defendant, where a question at issue is whether a chauffeur, who was hired by the defendant and was driving his automobile at the time of the accident, was at that time acting within the scope of his employment and where it appears that at the time of the accident the chauffeur was returning from his home, over a mile from his employer's home, where he had been for a noon meal, and the chauffeur has testified that the defendant never had told him not to use the automobile for the purpose of going to his noon meal and similar purposes, it is proper to exclude a question, asked of the chauffeur by the plaintiff, as to whether he was willing that the defendant should have known that he took out the car in order to go to his noon meal.

TORT, by the administratrix of the estate of John E. J. Hartnett, late of Boston, for the conscious suffering and death of the intestate alleged to have been caused by his being run over by an automobile of the defendant due to negligence of the chauffeur. Writ dated February 19, 1912.

In the Superior Court the case was tried before *Dana, J.* The circumstances under which Kravatz, mentioned in the opinion, testified, were as follows: The defendant was called as a witness by the plaintiff and had testified that on the day of the accident he owned only one automobile and that Kravatz "was in his employ at that time as chauffeur." The plaintiff's counsel then asked him, "Do you make any question that he was in the car, that he was operating the car that ran down Hartnett?" The defendant's counsel objected to the question and there was a long colloquy between the judge and counsel, from which it appeared that Kravatz was in the court room under summons by the defendant. The defendant's counsel suggested that the plaintiff put Kravatz on the stand for the purpose of asking him whether he was operating the car that ran over Hartnett. With reluctance, at the suggestion of the judge, the plaintiff's counsel did so, after the defendant's counsel had said, "I will waive my rights of cross-examination and examine him direct." It was

while Kravatz was being examined by the defendant's counsel that his testimony, described in the opinion, was given.

Other material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant and reported the case for determination by this court, with the following stipulation: "If the plaintiff was entitled to go to the jury on any ground whatsoever on all the evidence in the case and the issues raised by the pleadings, there shall be judgment entered for the plaintiff in the sum of \$3,500. In case that the action should not have been submitted to the jury on the evidence presented, there shall be judgment entered for the defendant, unless any of the plaintiff's exceptions to the admission or rejection of evidence are sustained, in which case there shall be a new trial."

W. R. Sears, (*E. O. Proctor* with him,) for the plaintiff.

E. I. Taylor, for the defendant.

HAMMOND, J. This is an action of tort brought by the administratrix of the estate of one Hartnett, to recover for his injuries and death caused by a collision between a bicycle ridden by him and an automobile owned by the defendant, upon a public street about half past one o'clock in the afternoon of October 13, 1911.

There can be no doubt that upon the evidence the questions of the due care or negligence of Hartnett and the chauffeur were for the jury. The only remaining question is whether at the time of the accident the latter was the defendant's servant acting within the scope of his employment; and the burden of showing that he was rested upon the plaintiff.

Upon this question it appeared, or there was evidence tending to show, that the automobile was owned by the defendant and was registered in his name, and that Kravatz, the chauffeur, was in his employ as such at the time of the accident. Kravatz testified that at that time he was not in the employ of the defendant, but of his (the defendant's) mother; that she hired him and paid him; that he "would take orders from Mr. Reuben Gryzmish [the defendant] if he gave [the] witness any orders, but he never did give any orders. Took orders from everybody in the family, not particularly him or nobody [*sic*] else; . . . took orders from everybody that rode in the car and from . . . [the defendant] just as much as from any other member of the family." The

assistant superintendent of the garage in which the car was kept testified that Kravatz was accustomed to take out the car "about three times a day for some weeks or possibly months" preceding the day of the accident; that "there was no limitation so far as the garage was concerned as to rights of Kravatz to take out the car at any time;" that he had seen the defendant ride in the car not oftener than once a week while the car was kept in the garage, and that he "could not say that any one else except Kravatz preceding the thirteenth day of October took that car from the garage." There was no evidence that any one other than Kravatz ever ran the car, or that he was in the employ of the defendant for any other purpose. In the registration certificate of the car the residence of the defendant is given as "No. 1089 Boylston Street, Boston, Mass.," which, as Kravatz testified, was the place where the defendant's mother resided; and on this and the further evidence of the chauffeur as to the family, the inference may be fairly drawn that the defendant and his mother were members of the same household. There is no evidence as to what was the business of the defendant, or indeed whether he had any business.

The only evidence of the general movements of the car immediately preceding the accident and of the purpose for which he was then using the car came from Kravatz, who testified in substance that on that day he started out from the garage with the car at about twelve o'clock, noon; that he went from there directly to his house on Wayland Street, in Roxbury, near Grove Hall; that after dinner he started to go to 1089 Boylston Street, to meet the defendant's mother at a quarter past two to take her out; that while travelling for that purpose, and being at or near the corner of Tremont and Whittier Streets, which in his opinion was a little over a mile from 1089 Boylston Street, the accident occurred; that he once before had used the car to go to dinner; that he did not steal the car that day; that he had used the car to go into town to buy supplies for the car; that neither the defendant nor his mother ever told him (the witness) not to use the car for the purpose of going to dinner and for similar purposes; that he never told the defendant that he used it for that purpose and that he did not know that the defendant ever knew of such use.

It does not appear what were the terms of the contract between

the defendant and Kravatz. It is not contended by the plaintiff that Kravatz lived in the family of the defendant, or that the latter was to furnish the former with dinner. Indeed the only fair inference from the testimony is that Kravatz, who lived at least more than a mile from the residence of the defendant, was to procure his own meals, and that the time required for that purpose should be his and not the defendant's. The case varies materially from *Reynolds v. Denholm*, 213 Mass. 576, and *McKeever v. Ratcliffe*, ante, 17.

If the evidence of the chauffeur as to the purpose for which he was driving the car at the time of the accident is to be believed, then the plaintiff has failed to show that he was at that time acting within the scope of his employment, but has shown rather that he was acting for his own private purpose.

It is urged however by the plaintiff that in view of the peculiar circumstances under which Kravatz was called and his examination conducted she had the right to ask the jury to disbelieve him as to the purpose for which he was driving the car at the time of the accident, and that if they did disbelieve him the other evidence warranted a verdict for her.

But even if the evidence of Kravatz be stricken out, then there is absolutely no evidence as to the purpose for which he was driving. Whatever may be the rule elsewhere (see *Stewart v. Baruch*, 103 App. Div. (N. Y.) 577), it never has been the rule here that simple proof of the ownership of the car by the defendant and that the chauffeur is his servant makes out a *prima facie* case for the plaintiff on the question whether on an occasion like that in the present case the chauffeur was acting within the scope of his employment. See *Reynolds v. Denholm*, 213 Mass. 576, and *Bourne v. Whitman*, 209 Mass. 155. Without the evidence of the chauffeur as well as with it the case of the plaintiff falls; and in neither aspect of the case was the defendant called upon for explanation.

There was no error in the rejection of the question put to Kravatz as to whether he was willing that the defendant should have known that he took out the car in order to go to dinner.

In accordance with the terms of the report the entry is

Judgment for the defendant.

EDWARD CAWLEY vs. WILFRID JEAN.

Middlesex. December 8, 1913. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Landlord and Tenant, Covenants in lease. *Contract*, In writing, Construction. *Evidence*, Extrinsic affecting writings. *Damages*, In contract. *Words*, "Now," "As good."

Where a lease of real estate is dated on the first day of the term that it creates, and purports to have been executed on that day, but in fact was executed about five months later after certain changes had been made in the buildings on the premises, and contains a covenant of the lessee to deliver up the premises at the end of the term in "as good order and condition . . . as the same now are," the condition referred to is that at the date of the lease and not that at the time of its execution, and the plain words of the covenant cannot be varied by any extrinsic evidence to the contrary.

A covenant by a lessee of real estate to "deliver up the premises to the lessor . . . at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are," contained in a lease which also contains a stipulation of the lessee that he will not "make or suffer to be made any alteration therein, but with the approbation of the lessor thereto, in writing . . . first obtained," does not require the lessee to restore to its original condition a building which has been altered during the term with the consent of the lessor, but means that the building at the expiration of the term shall be returned to the lessor in a state of repair as good as it was in at the beginning of the term both in regard to the unchanged portion of it and the parts that have been altered in conformity with the provisions of the lease.

In an action for a breach by a lessee of real estate of a covenant to return the premises with their permitted alterations at the end of the term in as good condition as they were in at the beginning of it, the plaintiff on proving the breach of covenant is entitled to recover such a sum of money as at the end of the term would put the premises in the condition in which the tenant was bound to leave them.

Where on the back of a lease of real estate and personal property, that contained an agreement of the lessee to purchase the leased property at the end of the term, there was indorsed an express agreement signed by both the parties that by reason of damage done to personal property included in the lease by a fire that occurred after the date of the lease "and to cover all loss sustained by said [lessee] under the within agreement in consequence of said fire, there shall be allowed to him upon his completing the terms of the purchase herein provided for, the sum of \$325, from off the purchase price within named," the lessee, having chosen to limit his remedy for loss by fire to a deduction from the purchase price, cannot claim, in case he does not make the purchase, any right to deduct the amount of such loss from the amount due from him as rent under the lease.

CONTRACT for the alleged breach of certain covenants contained in a lease in writing from the plaintiff to the defendant of a certain building and the machinery and fixtures contained in it, on Church Street in Lowell, used as a steam laundry, the instrument of lease containing also an agreement to purchase the premises at the termination of the lease and being dated October 21, 1901, although it was not executed until March 8, 1902, and having indorsed on its back an agreement of the last named date signed by the plaintiff and the defendant. Writ dated March 6, 1906.

The declaration contained five counts. The third and fourth counts were waived at the trial. The second count was for an alleged breach of a covenant to deliver up the premises at the end of the term in as good order and condition, reasonable use and wearing thereof, fire and unavoidable casualties excepted, as the same were in at the beginning of the term or might be put in by the plaintiff. The first count was for an alleged breach of the covenant to pay rent, and the fifth count was on an account annexed for \$103.33, alleged to be due as rent from April 22, 1903, to June 23, 1903.

The instrument of lease and agreement above referred to was as follows:

"This indenture, made the twenty-first day of October in the year of our Lord one thousand nine hundred and one.

"Witnesseth, that Edward Cawley of Lowell County of Middlesex and Commonwealth of Massachusetts do hereby lease, demise, and let unto Wilfrid Jean of said Lowell the following described premises, viz: the land and building thereon situate on the west side of the Concord River in said Lowell, bounded easterly by said river, — westerly by the location of the Lowell and Andover Railroad, and northerly by Church Street, being a triangular lot, together with all fixtures and machinery to said Cawley belonging in said building. And said Jean agrees at the expiration of the term hereinafter limited to buy the aforesaid real and personal property of said Cawley for the entire price of seven thousand dollars, — one thousand dollars of which is to be then paid down in cash upon delivery of deed from said Cawley to him, and the remaining six thousand dollars to be secured by mortgage of said premises providing for annual payments of the principal thereof

in sums of at least \$500.00 yearly; — And said Jean hereby is granted the right to make said payment of one thousand dollars, and thereupon become entitled to his said deed of conveyance at any time earlier than the said term of this lease as he may elect. And the said lease thereupon to forthwith terminate. The said Edward Cawley on his part agrees to make and execute to said Jean the deed of conveyance of said property, upon the compliance of said Jean with the foregoing provisions in that regard relating.

“To hold for the term of eighteen months from the 21st day of October nineteen hundred and one yielding and paying therefor the rent of fifty dollars per month.

“And said lessee doth promise to pay the said rent in said instalments of fifty dollars each per month for such time hereafter as may elapse before he shall receive his said deed under the stipulations aforesaid, and to quit and deliver up the premises to the lessor, or his attorney, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are, or may be put into by said lessor, and to pay the rent as above stated, during the term, and also the rent as above stated, for such further time as the lessee may hold the same, and not make or suffer any waste thereof; nor lease, nor underlet, nor permit any other person or persons to occupy or improve the same, or make or suffer to be made any alteration therein, but with the approbation of the lessor thereto, in writing, having been first obtained; and that the lessor may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof.

“And provided also, that in case the premises, or any part thereof during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall thereby be determined and ended at the election of the said lessor or his legal representatives.

“In witness whereof, the said parties have hereunto inter-

changeably set their hands and seals the day and year first above written.

Edward Cawley [Seal.]

Wilfred Jean

"Signed, sealed and delivered in presence of [Seal.]
Nathan D. Pratt."

Indorsed on the back of this instrument was the following:

"It is hereby agreed by the within named parties, that by reason of the damage done to the personal property included in the within agreement by fire on January 22nd, 1902, and to cover all loss sustained by said Jean under the within agreement in consequence of said fire, — there shall be allowed to him upon his completing the terms of the purchase herein provided for, — the sum of three hundred and twenty-five (\$325.00) dollars, from off the purchase price within named.

"Lowell, March 8th, 1902.

"Witness to both

Nathan D. Pratt.

Edward Cawley

Wilfrid Jean."

In the Superior Court the case was referred to Alfred P. Sawyer, Esquire, as auditor, and afterwards was tried before *McLaughlin*, J., upon the auditor's report. The plaintiff did not contend that he was entitled to recover under the third and fourth counts of his declaration, and the defendant admitted that the plaintiff was entitled to recover under the first and fifth counts of his declaration the sum of \$138 for rent due, being the sum found by the auditor, but denied the right of the plaintiff to recover any larger sum, and denied the right of the plaintiff to recover under the second count of his declaration.

At the close of the evidence the defendant asked the judge to make the following rulings:

"2. The defendant is not liable on the second count of the plaintiff's declaration."

"5. The defendant is not liable for any alterations or changes in the building or machinery made before the date of the actual execution of the agreement sued upon.

"6. The defendant is not liable for any alterations or changes made with the consent of the plaintiff, express or implied.

"7. If the jury find that the plaintiff knew that the various

changes and alterations in the building and machinery for which the plaintiff claims to be compensated were being made by the defendant at the time they were made and that the plaintiff made no objection thereto, then the plaintiff has waived all claim for such alterations and changes and cannot recover on account thereof.

"8. The measure of damages for alterations and changes made in the building or machinery, under the circumstances of this case, is the lessened value of the premises in consequence thereof, and not the cost of replacing them in the condition in which they were before such changes and alterations were made."

The judge refused to make any of these rulings, and ruled that the plaintiff was entitled to recover, under the second count of his declaration, an amount which would enable him at the expiration of the term to put the premises in the condition they were in upon October 21, 1901, the beginning of the term limited in the lease, and that certain evidence, contained in an agreement between the counsel at the trial, relating to the cost of replacing the building and machinery, was competent, and further ruled that the defendant was not entitled to be credited on the sum due for rent the rental value of the premises during the time they were unfit for use after the fire.

It was agreed by the counsel that, if the rulings of the judge were correct in law, it would be the duty of the jury to return a verdict for the plaintiff on the first and fifth counts of his declaration in the sum of \$138 and interest thereon from the date of the writ, and for the plaintiff on the second count of his declaration in the sum of \$700 and interest thereon from the date of the writ, and that, subject to the defendant's exceptions to rulings of the judge, the judge should order the jury to return such a verdict; and a verdict accordingly was ordered and returned for the plaintiff in the sum of \$262.29 on the first and fifth counts of his declaration and in the sum of \$976.53 on the second count of his declaration. The defendant alleged exceptions.

S. E. Qua, for the defendant.

J. J. Devine, for the plaintiff.

RUGG, C. J. This is an action of contract in which the plaintiff seeks to recover damages for an alleged breach by the defendant of certain covenants contained in a written lease between the

parties, for a term to begin on October 21, 1901, and bearing that date but in fact executed on March 8, 1902.

The first point to be determined is the date to which the words "as the same now are" in that part of the covenant which requires the lessee to deliver up the premises at the end of the term in "as good order and condition . . . as the same now are," refer, that is, whether they refer to the time when they were in fact used on March 8, 1902, after changes and alterations had been made, or refer to the date named in the lease which is also the beginning of the term, October 21, 1901, before the alterations and changes were made. It is familiar law that, when parties have put their contract in writing, all previous or contemporary oral negotiations are merged in the written instrument, which conclusively is presumed to express the bargain made. This is not only a rule of evidence, but is founded upon the substantive rights of the parties. If the terms of the agreement are ambiguous, or the sense of a word employed is obscure, oral evidence is admissible to show all the circumstances attending the transaction in order that the writing may be interpreted in the light of the situation of the parties at the time it was made. But, where there is no uncertainty about the instrument, oral evidence is not admissible. *Butterick Publishing Co. v. Fisher*, 203 Mass. 122, 133. *Jennings v. Puffer*, 203 Mass. 534. *Rochester Tumbler Works v. Mitchell Woodbury Co.* 215 Mass. 194, 197.

Construing the lease in the case at bar according to the terms used, it does not appear to be uncertain or open to doubt. When the date of a lease and the beginning of its term are the same there is no room for construction as to the meaning of words expressing present time. The word "now" as matter of construction must refer to the date of the instrument and the beginning of the lease unless a mistake is apparent on the face of the papers, which is not the case here. "Now" has sometimes been held to mean the beginning of the term, when that is different from the date of the lease. *Holbrook v. Chamberlin*, 116 Mass. 155. *White v. Nicholson*, 4 Man. & G. 95. *Chesapeake Brewing Co. v. Goldberg*, 107 Md. 485. These cases do not control the case at bar, but tend to confirm the conclusion here reached.

A further question turns on the meaning of the words "as good order and condition" in the covenants by the lessee, "To quit and

deliver up the premises to the lessor . . . at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are." These words in leases have acquired no inflexible significance. They have not become words of property with a fixed and technical definition. They are to be interpreted as words used in written instruments commonly are interpreted in accordance with general usage and understanding. They seem to be reasonably plain. They impose on the lessee the obligation to make whatever repairs may be necessary in order that at the end of the term the estate may conform to the standard at the time fixed in the lease. *Jaques v. Gould*, 4 Cush. 384, 388. The covenant, however, is only to deliver the premises in "as good order and condition as" at the beginning of the lease. This involves a comparison with the standard established by the lease. It does not require that they be delivered in "the same shape and condition" as in *Reed v. Harrison*, 196 Penn. St. 337, nor in a "like condition" as in *Murray v. Moross*, 27 Mich. 203, nor in the "same state" as in *White v. Nicholson*, 4 Man. & G. 95. The significance of the difference between these and such like phrases substantially prohibiting any change in the condition of the premises, and the words in the present covenant, may be measured by reference to the further stipulation by the lessee that he will not "make or suffer to be made any alteration therein, but with the approbation of the lessor thereto, in writing . . . first obtained." This clause indicates a purpose in the minds of the parties that if both agree the lessee may make alterations. "Alteration" as applied to a building usually denotes a change or substitution in a substantial particular. *Commonwealth v. Hayden*, 211 Mass. 296. The repair and alteration clauses construed together manifest an intent that the building at the expiration of the term shall be returned to the lessor in a state of repair as good as it was in at the beginning as to both its original construction and also such changed state as it may be transformed into in accordance with the express terms of the lease. But it does not mean that alterations so made must be eliminated and the initial condition restored. If that had been in the minds of the parties, words indicating identity with the former condition and not comparative excellence would have been employed. *Marks v. Chapman*, 135 Iowa, 320,

323. See *Perry v. J. L. Mott Iron Works*, 207 Mass. 501; *Pfister & Vogel Co. v. Fitzpatrick Shoe Co.* 197 Mass. 277.

There is nothing in *Watriss v. First National Bank of Cambridge*, 124 Mass. 571, 576, inconsistent with this view. Although the same words occurred in the covenant in the lease under consideration in that case as in the one at bar, no such issue was involved as is presented here and the description of the covenant at page 576 as being one to deliver up the premises "in the same condition" was by way of reference and not of analysis or definition. A chance phrase used for one purpose in illustration or in the course of a chain of reasoning cannot be wrested out of its context and seized upon as stating a fundamental proposition of general application. See *Quinn v. Leathem*, [1901] A.C.495, 506.

The defendant made alterations in the building and changes in the position and arrangement of machinery. It was found by the auditor that these were made with the knowledge and consent of the plaintiff who waived the provision of the lease that no alterations should be made but with his approbation first obtained in writing. Under these circumstances the lease does not require of the lessee a restoration to the original condition.

The plaintiff had a right to demand under this covenant in the lease that the tenant leave the premises, as they have been altered during the term with his knowledge and consent, in as good order and condition (with the exceptions stated) as they were in at the beginning of the term. This is the extent of his right. He cannot require that they be restored to their original condition so far as they have been altered or changed with his consent during the term. The defendant's requests for rulings numbered 6 and 7 should have been given in substance. As this was not the rule of law adopted at the trial, the exceptions upon this point must be sustained.

If it should be found that there was a breach of the covenant as thus construed, the measure of damages would be such a sum of money as at the end of the term would put the premises in the condition in which the tenant was bound to leave them. *Watriss v. First National Bank of Cambridge*, 130 Mass. 343. *Appleton v. Marx*, 191 N. Y. 81, 87.

The defendant is not entitled to the deduction of \$50 from the amount of rent due under the first and fifth counts of the declara-

tion, being the proportional part of the rental for the period during which the premises were unfit for use by reason of the fire. The parties settled this matter by agreement indorsed upon the lease, whereby a concession was to be allowed to the tenant upon completing the terms of the purchase, which concession included "all loss sustained by said Jean under the within agreement in consequence of said fire." These are comprehensive words and cover all the damage sustained by the tenant in this respect. If he was willing to make an agreement which plainly limited his right in this respect to an allowance upon the purchase price, he cannot now seek to have it changed because the purchase has not been made. *Gaston v. Gordon*, 208 Mass. 265.

Exceptions sustained.

WILFRID JEAN vs. EDWARD CAWLEY.

Middlesex. December 8, 9, 1913. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Practice, Civil, Auditor's report, Exceptions, Requests for rulings. *Agency*, Existence of relation. *Officer. Police. Conversion.*

In an action, in which the question whether a certain person had authority to act as the defendant's agent was material, an auditor made a finding that the person in question was such agent and reported the substance of all the evidence before him on this point. The defendant moved that the report of the auditor be recommitted on the ground, among others, that the evidence before the auditor did not warrant this finding. The motion was denied and no exception was taken. Later at the trial, when the auditor's report was offered in evidence, the defendant moved that it should be excluded on the ground that the finding of the auditor on the question of agency was unwarranted. The motion was denied by the judge. *Held*, that the denial at that stage of the case and under these circumstances was proper.

Where at the trial of an action, in which the question whether a certain person had authority to act as the defendant's agent is material, and an auditor's report has been introduced in evidence in which the auditor made a finding that the person in question was such agent and reported the substance of all the evidence before him upon this point, it is a proper way to raise the question of law involved for the defendant to ask the presiding judge to rule that this finding of the auditor was not authorized by all the evidence before him and should be disregarded.

In an action for the alleged conversion of certain personal property of the plaintiff left by him in a vacant building belonging to the defendant, which formerly had been occupied by the plaintiff as a tenant of the defendant and had been used by the plaintiff as a laundry, where a material question was whether a certain police officer was acting as the agent of the defendant in preventing the plaintiff from removing his property from the building, it appeared that the building was on the beat of the police officer. The officer testified that the defendant told him that he had "had some trouble with that building . . . and for me to look out for it," and told him, if he "saw any one taking stuff out" to notify the defendant. The defendant testified that he told the police officer "to keep an eye on the premises as the building had been broken into two or three times within two or three years, but that he did not tell him to stop [the plaintiff] from taking any property out of the building." There was no intimation that there was any pay or agreement for compensation from the defendant. It appeared that the defendant, in the afternoon of the day when he had the conversation with the police officer, caused the property in the building to be attached as belonging to the plaintiff. *Held*, that there was no evidence warranting a finding that the police officer was the agent of the defendant, and *also*, that for this reason the conversation between the defendant and the police officer was not admissible in evidence.

In an action for the alleged conversion of personal property left by the plaintiff in a building of the defendant which the plaintiff formerly had occupied as the defendant's tenant, if it appears that when the plaintiff went to the building for the purpose of removing his property a police officer acting as the agent of the defendant told the plaintiff to leave the building at once or incur the immediate arrest of himself and all his employees, and not to remove the property without the defendant's permission, and that thereupon the plaintiff left the building and the property remained in the possession and control of such police officer as the agent of the defendant until after the plaintiff had gone, this is evidence of a conversion without showing a demand by the plaintiff for his property before bringing the action.

TORT, in two counts, the first being for the alleged conversion of certain personal property. The second count alleged that the plaintiff was a tenant of the defendant in a building belonging to the defendant on Church Street in Lowell, that the plaintiff while such tenant purchased at great expense and installed in the building a large quantity of machinery, piping, shafting and other articles which were trade fixtures used by the plaintiff in carrying on the business of a steam laundry in the building and which the plaintiff had a right to remove therefrom, but that the defendant forcibly prevented the plaintiff from removing such property. Writ dated July 19, 1906.

In the Superior Court the case was referred to Alfred P. Sawyer, Esquire, as auditor, and later was tried before *McLaughlin, J.*, upon the auditor's report and oral evidence. The denial by the

judge of a motion to exclude the auditor's report is stated in the opinion. The facts material to the question before this court which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. That all the evidence and findings in the auditor's report as to the conversation between officer Murphy and the plaintiff Jean is inadmissible and should be struck out of said report and not considered by the jury.

"2. That there was no evidence in the case sufficient to warrant a finding by the auditor that officer Murphy was authorized by the defendant to prevent the taking down and removal of any of the machinery or property of the plaintiff from the defendant's building.

"3. That the general findings or conclusions of the auditor in favor of the plaintiff are not warranted by the facts found by him.

"4. That the general findings or conclusions of the auditor in favor of the plaintiff are not warranted by the evidence reported which was properly admissible and by the facts properly found by him."

"7. That upon all the evidence in the case the plaintiff is not entitled to recover under the first count in his declaration."

"9. That there is no evidence in the case sufficient to warrant the jury in finding that the defendant converted any of the personal property of the plaintiff not covered by the injunction issued in the equity suit of *Cawley v. Jean*."

"15. That in determining whether the defendant authorized officer Murphy to prevent the plaintiff from removing his property from the defendant's premises the jury are not to consider any of the evidence or findings of the auditor as to the conversation between the plaintiff and officer Murphy.

"16. That the fact that part of the property declared for by the plaintiff in this action was attached in a suit brought by the defendant upon the same day upon which the plaintiff attempted to remove his property is not to be considered by the jury as evidence either of a conversion of any of the plaintiff's property by the defendant or in proof of the second count of the plaintiff's declaration."

"21. That there is no sufficient evidence in the case of any

demand made by the plaintiff upon the defendant for any of the property alleged to have been converted by the defendant and the jury must therefore return a verdict for the defendant upon the first count of the plaintiff's declaration."

The judge refused to make any of these rulings. He ruled that the plaintiff could not recover on the second count of the declaration, which alleged wrongful interference on the part of the defendant with the removal by the plaintiff of certain fixtures, and submitted the case to the jury on the first count.

The jury returned a verdict for the plaintiff in the sum of \$558.13; and the defendant alleged exceptions.

The case was argued at the bar in December, 1913, before *Rugg, C. J., Hammond, Loring, Braley, & De Courcy, JJ.*, and afterwards was submitted on briefs to all the justices.

J. J. Devine, for the defendant.

S. E. Qua, for the plaintiff.

Rugg, C. J. This is an action of tort for the conversion of personal property of the plaintiff in a building of the defendant, which the plaintiff had occupied as tenant. The pivotal question is whether there was evidence to warrant a finding that a police officer named Murphy was the authorized agent of the defendant.

The case was sent to an auditor, who reported the substance of all the evidence before him upon this point and made a finding that Murphy was such agent. The defendant moved that the report be recommitted for the reason among others that the evidence before the auditor did not warrant a finding of the existence of such agency. This motion was denied and no exception was taken. At the trial the defendant objected to the admission of the report on the ground that the conclusions of the auditor were not warranted on the competent evidence admitted and the facts found. This motion was denied rightly. The report could not be rejected at that stage of the case under these circumstances. *Briggs v. Gilman*, 127 Mass. 530. *Fair v. Manhattan Ins. Co.* 112 Mass. 320, 333. *Winthrop v. Soule*, 175 Mass. 400, 404.

Requests were made for rulings that the finding of agency by the auditor was not authorized by the evidence before him, and should be disregarded. As the auditor reported the substance of all the evidence before him upon this subject, these requests were

presented rightly. *Leverone v. Arancio*, 179 Mass. 439, 448. *Hunneman v. Phelps*, 199 Mass. 15, 20. *Picard v. Beers*, 195 Mass. 419, 427. *Fisher v. Doe*, 204 Mass. 34, 40. *Greene v. Corey*, 210 Mass. 536, 546. This is not a case where the contention is that the auditor has made material findings upon incompetent evidence. Such objections should be raised by a motion to recommit the report for amendment before the trial. *Collins v. Wickwire*, 162 Mass. 143, 145. *Sullivan v. Arcand*, 165 Mass. 364, 377. *Speirs v. Union Drop Forge Co.* 180 Mass. 87, 89. See now St. 1914, c. 576.

The substance of the evidence bearing upon the question whether Murphy was the agent of the defendant was that Murphy was a regular police officer of the city of Lowell, and during the period in question was travelling upon a beat on which there was a vacant building, formerly used as a laundry and containing considerable machinery and other trade fixtures, and at one time leased to the plaintiff by the defendant. Murphy testified that the defendant "said he had some trouble with that building over on Church Street, and for me to look out for it. Q. Just what language did he use? A. That is it, as well as I remember. . . . Q. Did he say to you, if you saw anyone taking stuff out of there to stop them and notify him? A. I believe he said, if I saw any one taking stuff out, that he had some trouble, and for me to notify Mr. Cawley." The defendant testified in his own behalf that he had a conversation with the police officer Murphy, in which he told him "to keep an eye on the premises, as the building had been broken into two or three times within two or three years, but that he did not tell him to stop Mr. Jean from taking any property out of the building." This is all the testimony before the auditor bearing upon the appointment of Murphy as agent for the defendant. Giving full weight to such inferences as the auditor fairly might draw from the appearance of the witnesses and their manner of testifying, it falls short of warranting a finding that such agency existed. It goes no further than the ordinary case of an owner asking the police officer on the beat to look after an unoccupied building so far as he could consistently with other duties, and notify him if any one undertook to take property from it. The common practice of an owner notifying a police officer that his house or building is to be unoccupied,

with the request for him to keep an eye on it, does not establish the relation of principal and agent. It is simply calling the attention of the public officer to a situation of property which may call for vigilance in the performance of his duty to protect property.

The evidence at the trial upon this point did not differ in material respects from that before the auditor. The defendant testified, that he had told Murphy that he "wished he would keep an eye on that laundry building . . . as it had been broken into a number of times;" that he did not tell him if he saw any one removing property to stop them and notify him, but that he expected that if the officer saw any one taking property out of the building he would stop it and report the fact to him as any officer would do under the circumstances; that he did not tell Murphy to stop the plaintiff, and that the latter's name was not mentioned in the conversation. Murphy testified, that the defendant had asked him "to look out for that building on Church Street as he had had some trouble with it. . . . All Cawley said was for the witness to look out for his property." This, too, falls short of establishing agency, whether treated by itself or in combination with the facts stated in the auditor's report. The general employment of Murphy was that of police officer, whereby the law imposed upon him the duty to protect property and preserve order. His entrance upon the real estate, where the conversion is alleged to have taken place, and his inquiry as to the purpose of the plaintiff and his men there, were within the general scope of his public duty. Of course his further conduct as described in the testimony of the plaintiff and some other witnesses went far beyond this. There is no intimation that there was any pay or agreement for compensation from the defendant. The facts are similar to those disclosed in *Healey v. Lothrop*, 171 Mass. 263, and are quite unlike those in *Hirst v. Fitchburg & Leominster Street Railway*, 196 Mass. 353. The case fails to present many elements tending to show agency, which have been held sufficient to establish liability on the part of an alleged principal. *Pennsylvania Railroad v. Kelly*, 101 C. C. A. 359. *St. Louis, Iron Mountain & Southern Railway v. Morrow*, 88 Ark. 583. *Foster v. Grand Rapids Railway*, 140 Mich. 689. *Tolchester Beach Improvement Co. v. Steinmeier*, 72 Md. 313.

Samuel v. Wanamaker, 107 App. Div. (N. Y.) 433. There are no supporting circumstances which give a color to the testimony of Murphy and the defendant different from that which the words used import, or which afford affirmative proof from which agency may be inferred. The building had been vacant for several years. It was on Murphy's beat and what he did was during his hours of duty and in uniform. He had no business relations with the defendant. It does not appear that he reported what had happened to the defendant. Even though he assumed to interfere where as the event proved he had no duty to perform, that does not render Cawley liable upon the facts disclosed. The circumstance that the defendant caused the property to be attached as that of the present plaintiff on the afternoon of the day when Murphy had the talk with the plaintiff, is not enough to establish such agency even when taken in conjunction with all the other evidence. As the plaintiff's case failed upon this point, his conversation with Murphy based on the assumption of such agency was received erroneously.

It follows that the first, second, fourth and seventh requests for rulings by the defendant should have been granted. Both these questions are very close and this conclusion is concurred in only by a majority of the court.

As the case may be tried again, we consider other questions argued.

Giving full weight to the testimony of the plaintiff touching the conduct of Murphy at the building (if at another trial there should be evidence showing his agency for Cawley) it was sufficient to warrant a finding of conversion. In substance Murphy is reported to have told the plaintiff to leave the building at once upon pain of instant arrest of himself and all his employees, and not to remove the property without the permission of the defendant. Under these circumstances the plaintiff left the building and the property in the control of Murphy, who remained there at least until after the plaintiff had gone. This evidence, if believed, was sufficient to justify the conclusion that Murphy excluded the plaintiff from the possession of his property and exercised a control over it inconsistent with the plaintiff's right as its lawful owner. *Spooner v. Holmes*, 102 Mass. 503, 506. *Scollard v. Brooks*, 170 Mass. 445. If these were the facts, it

was not necessary for the plaintiff to make a demand before bringing suit, as the act of Murphy constituted conversion.

The defendant has argued that some of the property consisted of trade fixtures which had remained upon the leased premises after the expiration of the term without any special agreement respecting them, and that on this ground the finding of the auditor is indefensible. There was no special request precisely touching this subject and manifestly there was considerable personal property, which was unattached to the building and which on all the evidence might have been found to have been converted. Moreover the jury were instructed that there could be no recovery for wrongful interference with the removal of certain fixtures. All the other requests for rulings which were not given were denied rightly.

Exceptions sustained.

WALTER MURPHY'S (dependent's) CASE.

Suffolk. December 10, 1913. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Workmen's Compensation Act.

Under St. 1911, c. 751, Part II, § 6, the Industrial Accident Board may award to a father as having been partly dependent for support upon the earnings of a son fifteen years of age, who received an injury arising out of and in the course of his employment from the results of which he died, the minimum compensation of \$4 a week for a period of three hundred weeks, although the wages of the boy were \$5.67 a week and the father furnished him with board, lodging and clothing which cost at least \$2.50 a week, if the boy contributed his entire wages to his father, and these with the wages of the father and of two others of the children were used completely, with no surplus, in the support of the whole family consisting of the father and mother and nine minor children including the deceased employee.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board awarding to Daniel Murphy as partly dependent for support on the earnings of his son Walter Murphy, a minor fifteen years of age, who received a personal injury arising out of and in the course of his employment which

resulted in his death on September 26, 1912, the sum of \$4 a week for three hundred weeks from September 20, 1912, the date of the injury, in accordance with the terms of St. 1911, c. 751, Part II, § 6.

The case was heard by *Pierce, J.* The facts shown by the report of the Industrial Accident Board are stated in the opinion. The judge made a decree approving the decision of that board and ordering payment in accordance therewith. The insurer appealed.

E. C. Stone, for the insurer.

A. T. Saunders, for the dependent.

HAMMOND, J. At the time Walter Murphy was injured he was fifteen years of age and was earning \$5.67 a week, all of which he had been turning over to his father, Daniel Murphy. The latter's family consisted of his wife and nine minor children, including Walter. Of these children three were at work "earning in the aggregate \$21.67 per week, which was turned over to the father." The father earned about \$10.50 a week, and these sums constituted the entire income of the family and were all "needed and used for their support, there being no surplus remaining." The father maintained his son Walter, furnishing him board, lodging and clothing, which cost at least \$2.50 a week. The only question is whether the father is entitled to \$4 a week minimum compensation, or some fraction thereof. The insurance company claims "that in determining the amount of compensation the fact should be considered that the father paid the expense of the son's maintenance to the extent of at least \$2.50 per week and, therefore, could not have been dependent to the full extent of the earnings of the son." The claimant maintains "that this cost of maintenance should not be deducted from the earnings of the deceased in arriving at the amount contributed by him to the claimant weekly, in calculating the extent of the partial dependency."

The Industrial Accident Board, in rendering its decision, after finding that inasmuch as the sum contributed by Walter was the entire "weekly wage" of the son and not a fractional part thereof "the father is entitled, as such partial dependent, to the full minimum weekly compensation of \$4 a week, and not to a fractional part of \$4 a week," uses the following language as explanatory of the grounds of its decision:

"The workmen's compensation act, Section 6, Part II, provides

that if the employee leaves dependents only partly dependent upon his earnings for support, there shall be paid such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. There is no provision in the act which provides for any deduction from an employee's wages when the employee contributes to the dependent all of his wages. The section above referred to provides for a case where only part of the employee's earnings are contributed to the dependent, and the statute gives no rule by which to measure the extent of the compensation due the partial dependent when the employee contributes all of his earnings, leaving it fair to assume that it was the intention of the Legislature in such a case, that the rule provided should be adopted, that one half of the wages of the employee should go to the dependent, which never should be less than the minimum of \$4 per week. Notwithstanding the English case of *Tamworth Colliery Co. v. Hall*, 4 B. W. C. C. 313, in which it was held that the cost of the maintenance of the son and the value to the father of the son's services in the barber business should be taken into account in estimating the amount of compensation belonging to the dependent under the act, we find that there is no provision in our statute for any such deduction. The statute explicitly states that the dependent is entitled to the same proportion of the weekly payments as the amount contributed bears to the annual earnings. Had the amount contributed been \$4 instead of \$5.67, the claimant would have been entitled, under Section 6, Part II, to 400/567 of the minimum of \$4, that is, to the payment of \$2.82 a week, for the statutory period. We therefore find, that the deceased employee, Walter Murphy, contributed his entire earnings to the dependent Daniel Murphy, the proportion contributed being 100%, and that there is due the said dependent from the insurer 100% of the minimum compensation provided by the statute, that is, (the payment of \$4 a week for three hundred weeks from September 20, 1912, the date of the injury)."

We adopt the reasoning of the board; and there is not much more to be said.

This statute was the beginning of a new kind of legislation and

was dealing with a class of cases involving an infinite variety of circumstances. The Legislature may well have thought that it was not wise to attempt at first to provide a specific rule for every possible case, but simply to provide a few general rules easily understood and easy of application and, as experience dictated from time to time, to make changes. In the present case the father had a large family which he was legally bound to support, and this he was bound to do, whether the children could help or not. The amount contributed by Walter went to help the father in the support of the whole family. Whether it is wise to distinguish as to the support of the individual members of a family in a case like this as the insurer suggests, is for the Legislature. We think that the conclusion of the Industrial Accident Board is in accordance with the language of the statute.

Decree affirmed.

COMMONWEALTH vs. TIMOTHY E. SULLIVAN.

SAME vs. WILLIAM O'HALLORAN.

Middlesex. December 13, 1913. — June 17, 1904.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, SHELDEN, DE COURCY,
& CROSBY, JJ.

Keeping Room for Registering Bets or Buying or Selling Pools.

Upon a complaint under R. L. c. 214, § 17, for keeping a room for the purpose of registering bets or of buying or selling pools, the offense is made out if the room is shown to have been kept for either of these unlawful purposes.

The keeping of a room for the purpose of selling books for twenty-five cents each, having coupons attached for guessing the winners at certain baseball games, the money received from the sale of the books constituting a pool out of which prizes were paid to the winners in the guessing contest, can be found to be a violation of R. L. c. 214, § 17.

TWO COMPLAINTS received and sworn to on May 15, 1912, each against a different defendant, under R. L. c. 214, § 17, for keeping certain rooms on the first and second stories of a building numbered 7 on Spring Street in Watertown for the purpose of registering bets and of buying and selling pools upon the results of certain games of baseball.

In the Superior Court the cases were tried together before *Chase, J.*, and the Commonwealth offered the evidence which is described in substance in the opinion. The defendants offered no evidence and asked the judge to order verdicts of not guilty on the ground that the evidence was insufficient to warrant a conviction. The judge refused to do this, and instructed the jury that they would be warranted in returning a verdict of guilty against each defendant.

The jury returned verdicts of guilty; and the judge reported the cases for determination by this court. If the evidence warranted a verdict of guilty, the verdict in each case was to stand; otherwise, the verdicts were to be set aside and verdicts of not guilty were to be entered.

The cases were submitted on briefs at the sitting of the court in December, 1913, and afterwards were submitted on briefs to all the justices.

W. S. Peters, H. J. Cole & F. H. Tilton, for the defendant Sullivan.

W. H. McSweeney, M. J. McSweeney & F. H. Caskin, for the defendant O'Halloran.

J. J. Higgins, District Attorney, & *C. J. Wier*, Assistant District Attorney, for the Commonwealth.

RUGG, C. J. The defendants severally were charged under R. L. c. 214, § 17, with keeping rooms with apparatus, books and devices for the purpose of registering bets and of buying and selling pools upon the results of certain games of baseball. There was evidence tending to show that the defendants kept the rooms and there kept and sold, for twenty-five cents each, books entitled, "American and National League Baseball Schedule and Record Book." The book was exhibited in evidence and is described in the record as containing many advertisements and a schedule of dates when and places where baseball games were to be played by the various clubs belonging to the American and National Leagues together with some other information. One page contained two coupons to be filled out in duplicate "by writing in the names of the baseball clubs which the contestant believed would score the greatest number of runs on each day of the following week." One coupon was to be given to one of the defendants and the other kept by the contestant. The names

of six different baseball teams could be used, but the name of one could not be used twice during the same week. Prizes of considerable amounts were offered.

While the selling of a pool and the registering of a bet is criminal, the offense of keeping a room for either or both of these purposes is single and is made out if the room is used for either unlawful purpose. *Commonwealth v. Moody*, 143 Mass. 177. *Commonwealth v. Clancy*, 154 Mass. 128. A pool has been defined as "a combination of stakes, the money derived from which was to go to the winner." *Commonwealth v. Ferry*, 146 Mass. 203. This does not mean, however, that all the money derived from the combination of stakes must go to the winner. Commonly the man who runs the pool makes something out of the transaction. It is enough to constitute the criminal offense if there is a combination of stakes a part of which is to go to the winner. Whether these books were worth twenty-five cents, or whether the whole scheme was an ingenious contrivance for selling pools upon the result of guesses as to the number of runs to be made by baseball teams, was a question of fact to be determined by the jury. The evidence is susceptible of the inference that the twenty-five cents paid nominally for the purchases of coupon books constituted a pool out of which were paid the prizes to the winners in the guessing contest. Whether the aggregate of the prizes constituted the entire pool does not appear in the evidence and is of no consequence. But it is enough if the proceeds of the so called purchases of the coupon books constituted a fund out of which the so called prizes, — in fact the proceeds of the pool, — were paid to the winners in the game of chance. The jury saw the coupon book. They might have said that it was plainly worthless and that the real transaction was that the so called purchaser put up twenty-five cents in return for the coupons upon which to make his bets, and that the so called prizes were paid out of the pool produced by the aggregate of these twenty-five cent payments.

The transaction might also have been found to be a registering of bets. A bet is the hazard of money or property upon an incident by which one or both parties stand to lose or win by chance. See *Lang v. Merwin*, 99 Maine, 486, 488. In substance, this transaction may have been found to be a bet that the ball teams selected by the purchaser of the book would make the given num-

ber of runs, and upon the accuracy of that bet he stood the chance of winning the amount of the prize. In the opinion of a majority of the court, the entry in each case must be

Exceptions overruled.

JAMES H. COLLINS vs. BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 20, 1914. — June 17, 1914.

Present: RUGG, C. J., LORING, SHELDON, DE COURCY, & CROSBY, JJ.

Negligence, In use of Highway.

At the trial of an action against a corporation operating a street railway for injuries to the plaintiff's horse and buggy, if the plaintiff's servant, who was driving the horse at the time of the accident, testifies that, before turning to drive across the parallel tracks of the defendant, he looked back for the distance of four hundred feet and saw that the tracks behind him were clear, and that, when he was driving diagonally across the tracks and just before he had reached the second track, a car on that track, coming from behind, either struck the axle of the buggy or, as testified by the driver's companion, "struck the buggy between the off forward wheel and the horse," and then stopped within its own length, there is no evidence that the driver was in the exercise of due care, because, when he turned to cross the tracks, the car must have been so near that if, as he testified, he looked and did not see it, he must have looked carelessly.

TORT for injuries to the plaintiff's horse and buggy from being struck by a car of the defendant at about nine o'clock on the evening of June 25, 1910, when one McDonough was driving the horse across the defendant's tracks on Massachusetts Avenue in Cambridge, intending to go into Cambridge Street. Writ in the Municipal Court of the City of Boston dated October 15, 1910.

On appeal to the Superior Court the case was tried before Fox, J., who at the close of the plaintiff's evidence, which is described in the opinion, ordered a verdict for the defendant. The plaintiff alleged exceptions. It was stated in the bill of exceptions that McDonough "for the purposes of the case was admitted to be the plaintiff's servant." McDonough was accompanied by one Russell, who was helping him to bring a sick horse from Watertown to Charlestown. Russell was holding the rope

of the halter of the sick horse, which was following behind the buggy. McDonough was sitting at the left of the seat and Russell on the right.

W. A. Buie, for the plaintiff.

G. E. Morris, for the defendant.

LORING, J. This is an action in which the plaintiff seeks to recover damages for injury to his horse and buggy caused by a collision with one of the defendant's cars. Taking the view of the facts which is most favorable to the plaintiff, they were as follows:

At the time of the accident the horse was being driven by the plaintiff's servant, one McDonough by name. When McDonough came to the junction of Garden Street and Massachusetts Avenue in Cambridge, he saw an inbound car coming down the avenue. Thereupon he turned to the left and drove up the avenue until the inbound car had passed. He then looked with a view to crossing the tracks and saw an outbound car. To avoid that car he kept further on up Massachusetts Avenue, in all about two hundred feet. He then looked again to see if there was a car coming, and seeing that none was in sight, started diagonally across the tracks. When he started diagonally to cross the tracks his off forward wheel was about two feet from the nearer rail of the inbound track. When he had nearly traversed the space between the inbound and the outbound tracks, the left hand front corner of an outbound car hit the axle of the buggy, as he testified, or, as his companion testified, the corner of the outbound car "struck the buggy between the off forward wheel and the horse."

McDonough testified that he was driving at the rate of two and a half miles an hour, and that he was sure that he was not going faster than that when driving to go across the tracks. He also testified that when he looked for the last time he could see for a distance of two hundred feet beyond Garden Street, making the distance which he, at that time, said that he could see, four hundred feet, disregarding the width of Garden Street. There was no direct evidence as to the rate at which the car was going. McDonough's companion testified that the car went a car length after it hit the buggy, and there was no evidence to the contrary. The accident happened at nine o'clock in the evening of a day toward the end of June.

McDonough's story that he looked back for a distance of four

hundred feet just before he started to drive across Massachusetts Avenue, is an incredible one. His story was that the buggy was a Goddard buggy with the top up, one section only being turned back; that he was sitting on the left side, and yet that when "he stooped down and leaned in front of Russell," his companion on the right, he could see around the side of the buggy, which was up, and could look back for a distance of four hundred feet.

But taking his story as he put it, there was no case for the jury. A car which hit the forward wheel, or the "buggy between the off forward wheel and the horse," and which stopped within its own length, must have been so close when McDonough started to drive over the intervening twelve feet that it was negligent for him (McDonough) to have undertaken to cross in front of it. Under these circumstances, if McDonough looked he must have looked carelessly, and so is in the same situation as if he had not looked at all. The case comes within *Fitzgerald v. Boston Elevated Railway*, 194 Mass. 242; *Willis v. Boston & Northern Street Railway*, 202 Mass. 463; *Cokinos v. Boston Elevated Railway*, 209 Mass. 225.

The cases cited by the plaintiff do not require special notice. In the opinion of a majority of the court the exceptions should be overruled, and it is

So ordered.

MEREDITH W. PALMER vs. CHARLES W. LAVERS.

Suffolk. January 26, 27, 1914. — June 17, 1914.

Present: RUGG, C. J., LORING, SHELDON, DE COURCY, & CROSBY, JJ.

Equity Jurisdiction, To enjoin prosecution of appeal from judgment of lower court, Specific performance. *Equity Pleading and Practice*, Appeal. *Contract*, Validity. *Attorney at Law*. *Constitutional Law*, Right of trial by jury.

At the hearing in the Superior Court of a suit in equity to enforce an agreement by the defendant, made in consideration of the plaintiff releasing a claim of a mechanic's lien on real estate of the defendant upon the defendant giving him a bond without sureties for the payment of final judgment establishing his lien, that the defendant would not appeal from a judgment of a police court on a petition by the plaintiff for the enforcement of the lien, all of the evidence was taken by a commissioner, and, after findings of fact by the trial judge, a final decree was made enjoining the defendant from prosecuting his

appeal and ordering him to pay to the plaintiff the amount of the judgment rendered on the petition to enforce the lien. On an appeal by the defendant from the decree, all the evidence being before this court, it was *held*, that the decree must be affirmed, because it did not appear that the findings of fact by the judge upon which it was founded were plainly wrong.

An agreement by an owner of land, made with one who had filed a statement of a mechanic's lien upon the land, that, if the claimant of the lien would accept a bond signed by the owner without sureties for the release of the lien, he, the owner, would abide by the decision of a police court in which the claimant should file a petition for the enforcement of his lien, is not invalid as ousting the court of its jurisdiction; nor is it in contravention of the provision of the Seventh Amendment to the Constitution of the United States, assuring the right of trial by jury, because that right can be waived and by such an agreement it was waived.

The provision of R. L. c. 173, § 70, that "agreements of attorneys relative to an action or proceeding shall be in writing" in order to be of validity, has no effect upon an agreement, made by an owner of real estate through his attorney for a good consideration, to abide by the judgment of a police court on a petition thereafter to be filed for the enforcement of a mechanic's lien.

BILL IN EQUITY, filed in the Superior Court on February 5, 1912, in which the plaintiff alleged that on August 3, 1910, he filed a certificate claiming a mechanic's lien upon certain real estate of the defendant, that on August 23 the defendant asked him to accept his bond without sureties for a dissolution of the lien and agreed that in consideration of the plaintiff doing so he would abide by the judgment "of the lower court having jurisdiction of the plaintiff's petition to enforce his claim of lien" and would accept the judgment of that court as final and pay it at once; that the plaintiff, in consideration of the defendant's promise, accepted a bond of the defendant without sureties, the condition of which was that, "if the said obligor shall, within thirty days after the final judgment in any suit which may be brought to enforce the aforesaid lien, pay to the party claiming the same the sum of \$566.85, being the sum fixed as the value of the property so to be released as aforesaid, or so much of said sum as may be necessary to satisfy any amount for which such property may be found to be subject to such lien in such suit with costs therein then this obligation shall be void, otherwise it shall be and remain in full force and virtue;" that it was understood and agreed that the final judgment referred to was the judgment of the lower court, although the words "of the lower court" were omitted; that the plaintiff prosecuted to judgment in the Police Court of Somerville a petition to enforce his lien; that the defendant had appealed

therefrom and stated that he would not abide by the judgment of the police court and would not pay the judgment at once. The prayers of the bill were that the defendant be enjoined from prosecuting his appeal, that the bond be corrected to accord with the oral agreement of the parties and that the defendant be ordered to pay the amount of the judgment of the police court.

The defendant filed a "plea in bar" denying the making of the alleged agreement to abide by the judgment of the police court. The plaintiff joined issue "on the defendant's answer, or plea in bar."

The suit was heard by *Hardy, J.*, a commissioner having been appointed under Equity Rule 35 to take the evidence. The judge filed a memorandum of his finding, in which he stated that he was not satisfied that there was a mutual mistake of the parties as to having the words "of the lower court" inserted in the bond, so that he ought not to order a revision of the bond. It appeared that the petition for the enforcement of the plaintiff's lien was filed in the Police Court of Somerville on September 20, 1910, and that judgment thereon was rendered in that court on May 12, 1911. Other material findings contained in the memorandum are stated in the opinion.

A final decree was entered enjoining the defendant from prosecuting his appeal and ordering him to pay the judgment of the police court, \$601.88, with interest and costs. The defendant appealed.

G. P. Bryant, for the defendant.

A. S. Apsey, for the plaintiff.

LORING, J. This is an appeal from a final decree enjoining the defendant from prosecuting an appeal from a judgment rendered by the Police Court of Somerville establishing a mechanic's lien in favor of the plaintiff on land owned by the defendant. The case is before us on the evidence taken by a commissioner at the hearing in the Superior Court.

The defendant's principal contention is that the judge was wrong in finding for the plaintiff upon the evidence. The facts were, in substance, as follows: On August 3, 1910, the plaintiff filed a certificate claiming a mechanic's lien on certain land owned by the defendant, situated in Somerville. On August 23 the defendant's counsel, W. N. Tuller, Esquire, wrote to David T.

Dickinson, Esquire, counsel for the plaintiff, who was then in Holderness, New Hampshire, asking Mr. Dickinson if the plaintiff would be willing to release his attachment on the defendant's giving a bond for the lien. In that letter he said that the reason for the defendant's desiring to get a release of the mechanic's lien was: "He wishes to change his temporary loan now into his permanent loan, and the existence of that lien prevents the completion of the transaction. . . . All we shall ask is that you prosecute your lien to the judgment, when it will be paid at once." On August 24 Mr. Dickinson wrote two letters, one to Mr. Tuller in answer to his letter of August 23, and one to his associate in Boston, Mr. Woodman. In his letter to Mr. Tuller, Mr. Dickinson wrote, "I assume that a prosecution of the lien to judgment in the lower court will be satisfactory, upon which judgment it [the amount due on the mechanic's lien] will be paid." In Mr. Dickinson's letter to his associate, Mr. Woodman, he wrote, "I think this course, as is outlined, particularly the judgment in the lower court being final, helps to expedite matters for Mr. Palmer." On August 24 Mr. Tuller wrote to Mr. Dickinson a further letter in which he stated that the plaintiff was doing other work for Mr. Lavers and that "it would aid Mr. Lavers in meeting this payment if the lien were released as above indicated. We would like to have you wire us at our expense if you are satisfied to have the lien released in the above way." There was nothing in this letter to the effect that the judgment in the lower court should be final. On August 25 Mr. Dickinson sent a dispatch to Mr. Tuller in these words: "I approve accepting Mr. Lavers personal bond and releasing lien."

There was an interview between Mr. Tuller and Mr. Woodman in Boston on the morning of August 25. About this there was no dispute. There was also no dispute about the fact that after that interview a release was drawn by Mr. Tuller and subsequently executed by Mr. Palmer.

Mr. Woodman testified in terms that at this interview on the morning of August 25 Mr. Tuller agreed that the decision of the lower court should be final, and that payment would be made on such judgment being rendered.

Mr. Tuller in his testimony denied that such an agreement was made at that time, but he admitted that at that time the defend-

ant did not contest the plaintiff's bill. Mr. Tuller also testified that he consulted on this matter every day with Mr. Lavers, who had an office adjoining his.

It was left somewhat in doubt, on Mr. Woodman's testimony, whether Mr. Dickinson's telegram of August 25 was before him and Mr. Tuller at their meeting on August 25, when the agreement testified to by him was made; but he testified that all of the letters were then before them except (as we understand the evidence) Mr. Tuller's letter to Mr. Dickinson dated August 24.

On these facts the judge of the Superior Court found that there was an agreement that the judgment in the lower court should be final, and that this agreement was made not by Mr. Tuller as an attorney, but was authorized by the defendant himself. The exact wording of that finding is: "And I am satisfied that at that time the defendant as well as defendant's counsel understood that the plaintiff would only release such mechanic's lien upon the giving of a bond which provided for the payment of the judgment obtained in the lower court." We construe this to be a finding that the defendant authorized the agreement, and that it was not an agreement made by the defendant's attorney as an attorney. The judge made this further finding: "I do not necessarily find by that that it was intended by the parties that it [the bond] should contain the words 'of the lower court,' but I am satisfied that both parties understood when the release was agreed to that the judgment of the lower court would be final."

The question of the terms of the agreement which was made is a matter which depends upon the view which the judge took of the credibility of the witnesses who were seen by him and of the accuracy of the testimony given by them. His finding will not be upset unless it is plainly wrong.

The defendant's principal contention in this connection is that the telegram of Mr. Dickinson was in itself an acceptance of the offer made by Mr. Tuller, and that that offer did not, in terms, contain a provision that the judgment of the lower court should be final. But it is plain that the judge could find that the ultimate agreement was made not by that telegram, but at the interview which took place on August 25, and his finding to that effect cannot be said to be wrong. This finding therefore must stand.

The defendant also has contended that the agreement, if made, is one which the court will not enforce; and he relies in this connection on the well settled doctrine that a collateral agreement for arbitration contained in an executory contract is one which will not be enforced because it ousts the court of its jurisdiction. He also relies upon the decision in *Nute v. Hamilton Mutual Ins. Co.* 6 Gray, 174, in which it was held that an agreement that all actions against the insurance company there in question should be brought in Essex County, was one which the court would not enforce. We are of opinion that where one of two parties to a possible litigation, in order to obtain a release from what is equivalent to an attachment, agrees that the judgment of the court of first instance shall be final, that agreement does not come within that principle, and that it is an agreement which is binding and will be enforced. See in this connection *Daley v. People's Building, Loan & Saving Association*, 178 Mass. 13; *Mittenthal v. Mascagni*, 183 Mass. 19. In the case at bar what the defendant wished was to get his land released from the incumbrance of the plaintiff's claim of a lien. What the plaintiff wished was a speedy payment of his claim. We are of opinion that, under these circumstances, an agreement on the part of the defendant to abide by the decision of the Police Court in consideration of the plaintiff's accepting a bond without sureties for the release of his claim, is a valid agreement which the court will enforce.

The defendant has contended that because it is an agreement made by an attorney it is void under R. L. c. 173, § 70, since it is not in writing. That applies to agreements in a pending cause made by attorneys as such. See in this connection Note of the Commissioners on this section contained in the draft of the first practice act, St. 1851, c. 233, in Hall's Mass. Practice Act, 179, 180. Here no action was pending, and the judge found that the agreement was authorized by the defendant himself. Such an agreement is not within this statute.

The defendant further contended that the agreement is in contravention of the Seventh Amendment of the Constitution of the United States. But the right to a trial by jury is one which could be waived, and by agreeing that the judgment of the lower court should be final, it was waived.

We have not found anything in the cases not noticed above which require special notice.

The entry must be

Decree affirmed.

GRENVILLE CLARK & others vs. TREASURER AND RECEIVER
GENERAL.

Suffolk. January 28, 1914. — June 17, 1914.

Present: RUGG, C. J., LORING, SHELDON, DE COURCY, & CROSBY, JJ.

Tax, Succession. Corporation, Foreign.

Where one who is the donee of a power of appointment over property, held by trustees under the will of the donor who were appointed by a probate court of this Commonwealth, dies domiciled in another State and exercises that power by making an appointment by will, so much of the trust property as consists of shares of stock of corporations incorporated by States other than this Commonwealth is not subject to a succession tax under St. 1909, c. 490, Part IV, § 1; c. 527, § 8, although the certificates for the shares are in this Commonwealth.

PETITION, filed in the Probate Court for the County of Suffolk on April 18, 1912, by the trustees under the will of Sarah A. Peele, late of Beverly, the administrator with the will annexed of the estate of Mary S. Dwight, late of Dublin, New Hampshire, and the daughter of Mary S. Dwight, to determine whether the whole or any part of property, held by trustees under the will of Sarah A. Peele, which, in the exercise by Mary S. Dwight in her will of a power of appointment, passed to daughters of Mary S. Dwight, was subject to a succession tax under St. 1909, c. 490, Part IV, § 1; c. 527, § 8.

In the Probate Court the petition was heard upon an agreed statement of facts by *Grant, J.*

It appeared that at the time of the death of Mary S. Dwight the trust property was held by three trustees who were appointed by the Probate Court for the County of Essex, two of such trustees being residents of this Commonwealth and one being a resident of the State of New York. The trust property consisted of stocks and bonds valued at \$139,037.14, part of which, valued at \$54,-

254.30, were stocks in corporations not organized under the laws of this Commonwealth. All the bonds and the certificates of stock were within this Commonwealth at the time of the death of Mary S. Dwight.

It was agreed that, if the Commonwealth was entitled to a succession tax upon all the trust property over which Mary S. Dwight had the power of appointment, the amount of the tax was \$2,488.89. If no such tax should have been assessed upon such part of the property as consisted of shares of stock in foreign corporations, the amount of the tax was \$1,441.56.

In the Probate Court, a decree was made that a tax should be assessed upon the entire trust property. The petitioners appealed.

The case was reserved by *Sheldon, J.*, for determination by the full court.

H. R. Brigham, for the petitioners.

A. E. Seagrave, for the respondent.

LORING, J. The test to be applied to determine whether property passing by the exercise of a power of appointment is or is not subject to an inheritance tax under St. 1909, c. 527, § 8, is this: Would the property in question have been subject to an inheritance tax if it had been the property of the donee of the power and had passed by way of devise or legacy under his will? That may be taken to have been settled by the opinion in *Minot v. Treasurer & Receiver General*, 207 Mass. 588, 590.

The test to be applied to determine whether the property of a non-resident is subject to an inheritance tax is whether it is "property within the jurisdiction of the Commonwealth," "corporeal or incorporeal, and [or] any interest therein." St. 1909, c. 527, § 1. St. 1909, c. 490, Part IV, § 1.

The property here in question consisted of stocks in foreign corporations held by trustees appointed by a Massachusetts Probate Court, and the certificates for these shares of stock in foreign corporations were in fact within the territorial limits of the Commonwealth when the succession took place. The presence within the Commonwealth of certificates of stock in foreign corporations does not make the shares represented by those certificates property "found" within the Commonwealth for the purposes of administration by an ancillary administrator. That was decided in *Kennedy v. Hodges*, 215 Mass. 112. That decision, and the reasoning on

which it was founded, are decisive here. The reasoning on which that decision rested was that certificates for shares in the capital stock of a corporation are merely title deeds of the shares, and that the presence within the territorial limits of the Commonwealth of the title deeds of the shares does not bring the shares themselves within the Commonwealth. To the same effect see *In re James*, 144 N. Y. 6, 12. See also *Peabody v. Treasurer & Receiver General*, 215 Mass. 129. The case of *In re Kissel's Estate*, 121 N. Y. Supp. 1088, affirmed in 142 App. Div. (N. Y.) 934, is relied on by both parties. In that case the certificates of the foreign corporations were in New Jersey when the donee of the power died and the succession took effect. As we understand the decision it went on the ground that the shares were shares in a foreign corporation and not on the ground that the certificates for the shares were in New Jersey. The other case relied on by the respondent (*In re Fearing*, 200 N. Y. 340) was a decision as to the locality of bonds and does not bear on the question which we have to decide, namely, the locality of shares in a foreign corporation. In connection with *In re Fearing*, *ubi supra*, see *Wheeler v. New York*, 233 U. S. 434.

It follows that the amount of the tax due upon the estate passing under the will of Mary S. Dwight is \$1,441.56. The decree of the Probate Court must be modified accordingly and, so modified, affirmed.

So ordered.

GEORGE ECONOMOPOULOS vs. A. G. POLLARD COMPANY.

Middlesex. March 2, 1914. — June 17, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Slander, Publication.

In an action against the proprietor of a department store for slander, in accusing the plaintiff of the crime of larceny, there was evidence tending to show that the plaintiff, who could understand or talk little if any English, was addressed in English by a clerk, when no one else was within hearing, and was asked "if he didn't want to pay for what he had taken," that, the plaintiff not understanding, the clerk called a Greek clerk to whom he said in English, referring to the plain-

tiff, "I think he has taken a handkerchief. . . will you speak to him?" that the Greek clerk said to the plaintiff in Greek, "This gentleman here accuse you that you steal a handkerchief." The plaintiff testified that there "were fifty or sixty men around there." There was no evidence that any one other than the plaintiff and the Greek clerk understood the Greek language. *Held*, that, assuming, without deciding it, that the words spoken could have been found to have been accusations of larceny, there was no evidence warranting a finding of their publication.

Defamatory words, spoken in a foreign language in the presence of third persons, are not actionable if they are comprehensible only to the person using them and the person accused.

TORT against a corporation maintaining a department store in Lowell, the declaration alleging in the first and second counts that servants and agents of the defendant assaulted and illegally detained the plaintiff, and in a third count that they falsely and maliciously charged the plaintiff with the crime of larceny, saying, "You have stolen a handkerchief from us, and have it in your pocket." Writ dated December 15, 1911.

In the Superior Court the case was tried before *McLaughlin, J.* The testimony of the plaintiff, who could understand or talk little if any English, was as follows upon the issue of the slander alleged in the declaration: He had entered the defendant's store for the purpose of examining and purchasing goods. "Before I went two steps a hand grabbed me and I asked 'What is the matter?' He didn't give me no answer but called with the hand (indicating) to some other to come. I didn't understand what he said nor what language he spoke. He did not speak in Greek. There came a man to the men who were holding me and they were in conversation in English which I didn't understand. The Greek clerk (Miralos) said to me, 'This gentleman here accuse you that you steal a handkerchief and that you have it in your possession.' This is what the Greek salesman said to me. 'You have a handkerchief and have it in your possession, you steal it.' . . . There were fifty or sixty men around there."

The testimony of Joseph Carrier, a clerk of the defendant, on the same subject was as follows: "There wasn't anybody else around there when I came to where he was excepting him. I asked him if he did n't want to pay for what he had taken. I got no reply from him and I sent for the young Greek clerk (Miralos) and told him what I had seen. The Greek clerk talked Greek, which I could not understand. . . . Two women went by. . . .

When Miralos came up I said to him, 'I think he has taken a handkerchief from that box, will you speak to him?' And George (Miralos) spoke to him. I called his attention that I thought the man (the plaintiff) had taken the handkerchief in these words: 'I think that man has taken a handkerchief, ask him about it.'"

The testimony of George Miralos, the Greek salesman, on the same subject was as follows: "Mr. Carrier called me and I came nearer and he say, 'Ask this man if he took any handkerchief from this box that he did not pay for?' I asked him if he took any handkerchief from this box and he say 'Search me.' . . . Mr. Joe Carrier told me all about it. I say, 'You know what he said?' Well, he say, 'Yes, he says I take a handkerchief,' and he opened his coat and he say 'Search me.'"

At the conclusion of the evidence the plaintiff asked the judge to rule as follows: "If the salesman of the defendant (Carrier) acting in the belief that he was protecting the property of his employer, falsely and publicly accused the plaintiff of theft, in any words conveying that plain meaning, his act was that of his employer and makes the employer liable for all injuries to the plaintiff resulting naturally from his words."

The judge refused to give the ruling asked for, ruled that there was no evidence for the jury on the third count, and submitted the case to the jury on the first two counts only. The jury found for the defendant; and the plaintiff alleged exceptions.

W. H. Bent, for the plaintiff.

F. N. Wier, (*J. M. O'Donoghue* with him,) for the defendant.

LORING, J. We do not find it necessary to decide whether the two statements relied on by the plaintiff could have been found to be accusations of larceny. If it be assumed that such a finding could have been made, the judge was right in directing the jury to find a verdict for the defendant because there was no evidence of publication of either of them. See *Downs v. Hawley*, 112 Mass. 237; *Rumney v. Worthley*, 186 Mass. 144. There was no evidence that anybody but the plaintiff was present when Carrier spoke to the plaintiff in English. There was no publication of this statement made in English, because on the evidence the words could not have been heard by any one but the plaintiff. *Sheffill v. Van Deugen*, 13 Gray, 304.

Nor was there any evidence of publication of the Greek words spoken by Miralos. For, although there was evidence that they were spoken in the presence of others, there was no evidence that any one could understand them but the plaintiff. *Sheffill v. Van Deusen*, *ubi supra*, at page 305, and cases cited.

Under these circumstances we do not have to consider the question whether Carrier and Miralos could have been found to be acting within the scope of their employment by the defendant in making the two statements relied upon, as to which see *Kane v. Boston Mutual Life Ins. Co.* 200 Mass. 265, 269.

Exceptions overruled.

LAURENT REVEL vs. CORDELIA VEIN.

Middlesex. March 3, 1914. — June 17, 1914.

Present: RUGG, C. J., LORING, BRALÉY, SHELDON, & CROSBY, JJ.

Evidence, Relevancy and materiality. Witness, Contradiction.

In an action of contract, where there was a declaration in set-off and the issues raised by the pleadings were as to amounts of money alleged to have been lent by the parties to each other, and where it appeared that the defendant was a woman and a hotel keeper with whom the plaintiff at times had lived, and no issue was raised by the pleadings as to any amounts due to the defendant from the plaintiff for board or lodging, if both parties introduce evidence in regard to personal relations of the parties, the defendant may testify in direct examination that, at a certain time when the plaintiff was living with her, he did not pay for his board, although previously the defendant had called the plaintiff as a witness and had asked him whether at that time he had paid for board and he had said that he had done so, because, the relations of the parties being in issue as affecting the probability of some of their financial dealings, the subject matter of the question was a material one, on which the defendant might contradict her own witness. *Whether*, if the subject matter had been immaterial, the testimony might have been admitted by the judge in the exercise of his discretion, was not decided.

CONTRACT for \$5,463.81, alleged to have been lent by the plaintiff to the defendant. Writ dated August 25, 1911.

The defendant filed a declaration in set-off for \$5,084.21, alleged to have been lent to the plaintiff by her.

The case was heard in the Superior Court by *Pratt, J.*, who disallowed some and allowed others of the items of both declara-

tions, and found for the plaintiff in the sum of \$1,502.50; and the plaintiff alleged an exception, solely to the ruling on evidence stated in the opinion.

W. H. Bent, for the plaintiff.

J. J. Hogan, for the defendant.

LORING, J. This action was brought to recover \$5,463.81, lent by the plaintiff to the defendant during twenty-five months, beginning April 20, 1909. The defendant filed a declaration in set-off, in which she claimed from the plaintiff \$5,084.21, for money lent by her to him. Of this sum of \$5,084.21, \$1,000 was lent in September, 1907; \$1,784 was lent "afterwards" and \$1,500 was lent "sometime in 1908." In the body of the exceptions there was no testimony as to the balance amounting to \$800.21. The plaintiff was a Frenchman; the defendant was a hotel keeper. For ten years, between 1896 and 1906, she kept a hotel in Worcester; for two years, between 1906 and 1908, she kept a hotel in New Bedford, and from "1908 to 1909" she kept a hotel in Lowell. It appeared that the plaintiff and the defendant became acquainted in 1905, when the plaintiff lived at the defendant's hotel in Worcester. There was evidence that the plaintiff was an author, and that in the early part of 1907, while in Paris, he wrote a book. The defendant testified that in September, 1907, the plaintiff asked her to lend him \$1,000 to pay for the printing of this book (which had been done in Paris), and that she did so. She further testified that the \$1,784 was lent by her to the plaintiff to purchase stock in a certain company in New Bedford, and that the \$1,500 was lent to the plaintiff to enable him to protect some shares in an insurance corporation in Canada. The plaintiff denied that he borrowed the \$1,000 or the \$1,784. He admitted borrowing the \$1,500, and his defense was that he had repaid it. The plaintiff also had a different story as to the \$1,784. The defendant called the plaintiff as a witness. To questions asked by her counsel, he testified that he stayed at the defendant's hotel part of the time in 1908, and that while there he paid his board. Later the defendant took the stand in her own behalf and was asked by her counsel whether the plaintiff did pay his board while he stayed at her hotel in 1908, and she testified that he did not. An exception to the admission of this testimony is the only question before us.

There are indications in the bill of exceptions that the defendant was allowed to give this testimony on the ground that, although it was immaterial, the plaintiff's testimony on the point was not binding on the defendant because the defendant, in calling the plaintiff, had called him as an adverse witness. But on this point the bill of exceptions is not clear.

In the trial of the case both parties went into evidence of the relations between them, evidently for the purpose of showing the likelihood or unlikelihood of the defendant lending these sums of money to the plaintiff. The defendant, without objection, put in evidence two love letters from the plaintiff to her, written at Paris in February, 1907, and the defendant testified, without objection, that the plaintiff made her presents of a silk dress, a gold bracelet and an amber necklace; while the plaintiff testified that he sold the dress to her; and that he did not make her a present of the bracelet or necklace.

Whether the plaintiff did or did not pay his board while he lived at the defendant's hotel in 1908, was a fact as to the relations between the parties which, taken in connection with the evidence in the case, might have a bearing upon the likelihood or unlikelihood of the defendant making the loan of \$1,784 (which was made in 1908), not to go further back to the loan of \$1,000 in 1907. On this ground we cannot say that the evidence was admitted wrongly.

It is not necessary to decide whether if the fact contradicted had been immaterial the presiding judge could, in his discretion, have admitted evidence to contradict it. As to this, see *Hathaway v. Crocker*, 7 Met. 262; *Brooks v. Acton*, 117 Mass. 204; *Treat v. Curtis*, 124 Mass. 348; *Bennett v. Susser*, 191 Mass. 329.

Exceptions overruled.

RICHARD W. BURNES vs. NEW MINERAL FERTILIZER COMPANY
& others.

Suffolk. March 4, 1914. — June 17, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Small Loans. Pledge. Bills and Notes.

The provision of St. 1912, c. 675, § 5, amending the small loans act, St. 1911, c. 727, § 17, that "any loan made or note purchased, or endorsement or guarantee furnished by an unlicensed person . . . in violation of this act shall be void," does not make void in the hands of a *bona fide* purchaser a note given as collateral security for a note given in violation of the act.

If a money lender, who, in a transaction within the provisions of the small loans act, St. 1911, c. 727, as amended by St. 1912, c. 675, and without being licensed as therein required, procured from a corporation as security for a loan to it of \$200 its note for \$500 indorsed for accommodation by several individuals and delivered the note to an associate who pledged it as collateral security for the associate's personal note given to one, who, in good faith and with no notice or knowledge of the infirmity of the security, lent such associate money therefor, the note giving the pledgee power to sell the security at public or private sale upon non-payment of the note; and if, upon default in the payment of such note, the pledgee sold the corporation's note for less than its face value at a public auction of which all parties to it had notice, both the pledgee and the purchaser having notice at the sale of all the foregoing facts, the purchaser at the sale, in an action on the note against the corporation and the indorsers, is entitled to recover the full amount of the note.

CONTRACT, against the New Mineral Fertilizer Company as maker of a negotiable promissory note for \$750, payable to its own order, and against it and William N. McCrillis and William B. Arnold as indorsers, all indorsements being in blank. Writ in the Municipal Court of the City of Boston dated April 15, 1913.

On removal to the Superior Court, the case was tried before *Lawton, J.* At the close of the evidence, all parties waived trial by jury and, upon facts agreed upon and in evidence, the judge found as follows:

The note was indorsed by the individual defendants before delivery without consideration and for the accommodation of the defendant corporation, which was maker and payee and indorser, and was then delivered to one George I. Robinson, Jr., under the following circumstances. The president of the defendant corpora-

tion, McCrillis, called on Robinson to arrange to take care of a note of the defendant corporation for \$700 which was about to mature, and took with him the note in suit, believing that it could be exchanged for the note of that amount about to mature. Robinson stated that such an arrangement was impossible, but that if the maturing obligation could be reduced to \$500, the person who held it (not Robinson) would renew the loan for that amount. McCrillis thereupon delivered to Robinson a new note of the defendant corporation for \$500, indorsed as is the note in suit, and also delivered to him the note in suit as security for a loan of \$200 at five per cent a month, to cover the balance of the \$700 note about to mature.

At the time of these transactions Robinson was engaged in Boston in the business of making loans of \$300 or less on which was to be paid for interest and expenses an amount exceeding an amount equivalent to twelve per cent per annum upon the sum loaned, and, in violation of the provisions of St. 1911, c. 727, as amended by St. 1912, c. 675, had not obtained from the supervisor of loan agencies a license to carry on that business in Boston.

Robinson obtained the \$200 by borrowing it from a third person for a short time, delivering to him the note in suit as security. When the loan by the third person was about to mature, the note in suit was taken by one McQuaid, an associate of Robinson, and McQuaid delivered it to the Winnisimmet Trust, Inc., as security for the repayment of a loan of \$390 then made to him, for which he gave his note in collateral form. One of the provisions of McQuaid's collateral note gave to the holder "full power and authority to sell, transfer, assign and deliver the whole of said property or any part thereof or any substitutes thereof or any additions thereto, without notice or demand, either at public or private sale, or otherwise, at the option of the holder, upon the non-payment or non-performance of this promise, or the non-payment of any or either of the liabilities above mentioned, at any time, and after deducting the legal or any other costs or expenses, whether for collection, sale, delivery, or otherwise, to apply the residue of the proceeds of such sale or sales so to be made to pay any, either or all of said liabilities as said holder shall deem proper, returning the surplus, if any, to the undersigned."

McQuaid's note was not paid at maturity and, pursuant to the power of sale therein contained, the note in suit was sold at an auction sale of which all parties, including the defendants, had due notice, and was purchased by the plaintiff for \$400.

At the time of the loan of Winnisimmet Trust, Inc., to McQuaid, when the note in suit was delivered to Winnisimmet Trust, Inc., Winnisimmet Trust, Inc., had no notice of any infirmity in the note, defect of title of McQuaid, or any irregularity in connection therewith, but, at the time of the auction sale of the note, Winnisimmet Trust, Inc., and the plaintiff were fully informed of all the facts connected with the note.

The judge ordered judgment for the defendants, and by agreement of the parties reported the case to this court for determination, with the stipulation that, if the finding and order were correct, judgment for the defendants was to be entered; otherwise, such judgment was to be entered as the facts and the law require or warrant.

C. A. Warren, for the plaintiff.

L. Bryant, for the defendants.

LORING, J. The defendants' first contention in this case is that where a negotiable security is deposited as collateral for a loan made in violation of the small loans act (St. 1911, c. 727, amended by St. 1912, c. 675), not only is the deposit of the security void, but the security itself, by force of that act, becomes a nullity, so that in case it is afterwards separated from the void loan and bought in good faith by an innocent purchaser for value, no recovery can be had upon it. They rely in this connection upon the cases in which it was held under the usury acts that no recovery could be had on notes made void by these acts; even when they are in the hands of *bona fide* purchasers for value; as to which see *Whitten v. Hayden*, 7 Allen, 407, and cases there cited. The history of these statutes is given in *Kendall v. Robertson*, 12 Cush. 156.

But four years before the usury laws were repealed, this policy of the Commonwealth was changed, and it was enacted by St. 1863, c. 242, that notes given for a loan on which usurious interest had been charged should be valid in the hands of a *bona fide* purchaser for value.

In the light of the policy finally adopted with respect to notes

founded upon usurious interest, we come to the true interpretation of the small loans act. It is apparent that there is nothing in that act which makes void not only notes given in violation of the act, but securities deposited as collateral for such notes. The language of the act (St. 1911, c. 727, § 17, as amended by St. 1912, c. 675, § 5) is: "Any loan made or note purchased, or endorsement or guarantee furnished by an unlicensed person, partnership, corporation or association in violation of this act shall be void." In *Van Schaack v. Stafford*, 12 Pick. 565, *Duncomb v. Bunker*, 2 Met. 8, and in *Harrison v. Hannel*, 5 Taunt. 780, the action was brought by the person to whom the usurious loan had been made. In such a case the loan itself is void, and nothing being due on the debt for which the collateral was deposited as security, no recovery can be had on the collateral.

The more difficult question in the case is whether the plaintiff can recover the full amount of the note or is restricted in his recovery on it to the amount which could have been collected by the Winnisimmet Trust, Inc.

It appears that the Winnisimmet Trust, Inc., was a *bona fide* purchaser for value. But it also appears that full information of all the facts was given to the plaintiff at the sale when he bought the note.

Under these circumstances the plaintiff must claim under the title of the Winnisimmet Trust (R. L. c. 73, § 75). By R. L. c. 73, § 44, the Winnisimmet Trust was "a holder for value to the extent of . . . [its] lien." This provision of R. L. c. 73, § 44, is a codification of the rule which had been adopted in Massachusetts before the negotiable instruments act was passed. The principle on which that rule was founded is that in such a case the *bona fide* pledgee should recover nothing more than the amount due to it (the pledgee), because, if it recovers more, it would hold the surplus for the pledgor; and as the note in the hands of the pledgor is void, all that ought to be recovered by the pledgee is the amount due on the loan made by it. *Stoddard v. Kimball*, 6 Cush. 469. *Fisher v. Fisher*, 98 Mass. 303. *Chicopee Bank v. Chapin*, 8 Met. 40.

The defendants have contended that inasmuch as the plaintiff in this action recovers not on the strength of his own title but on the strength of the title of the pledgee, he cannot recover more

than the pledgee could have recovered if the action had been brought by it.

The pledgee had a right to look to the collateral note for payment of the loan made on the faith of it. It had the right to realize upon that collateral in either one of two ways, namely, by suing on the note deposited as collateral, or by selling the collateral note. If the pledgee sued on the collateral note, all that it could recover was the amount due it, because any surplus would belong to the pledgor. But (as we have said) the pledgee also had the right to realize on the collateral by selling it. If he sold it, he had the right in selling it to get payment in full for his loan even if the collateral sold for less than par. If the collateral sold for more than enough to pay the loan due the pledgee, the surplus would go not to the pledgor, who had no right to recover on the note, but to the parties liable on the note.

Of the cases which have come to our attention, *Trust Estate of Woods, Weeks & Co.* 52 Md. 520, and *Peacock v. Phillips*, 155 Ill. App. 514, are the nearest to the case at bar. But the collateral sold in both those cases was the pledgor's own notes. Moreover in *Trust Estate of Woods, Weeks & Co. ubi supra*, the pledgor had become insolvent and the question of double proof of the same debt in competition with other creditors arose, as to which see *Third National Bank of Boston v. Eastern Railroad*, 122 Mass. 240, and *Beals v. Mayher*, 174 Mass. 470. But that was not the case in *Peacock v. Phillips, ubi supra*, which was decided, to some extent at least, on the authority of *Third National Bank of Boston v. Eastern Railroad, ubi supra*, and the dissenting opinion in *Trust Estate of Woods, Weeks & Co. ubi supra*. However it may be, when the collateral sold is the note of the pledgor, we are of opinion that when notes of third persons are taken as collateral in good faith by the pledgee he can realize his pledge by a sale, and that the purchaser at such sale, buying under the pledgee's rights, can enforce the face amount of the notes although he bought for less than par. The purpose of a margin in the amount of the collateral is to meet such a contingency.

If in the case at bar a surplus was paid by the plaintiff to the Winnisimmet Trust, Inc., the defendants are entitled to it, and on application by them to the Winnisimmet Trust they can obtain

it. If they had wished to do so, they could have redeemed the note while it was in the hands of the Winnisimmet Trust by paying the amount lent by it on the faith of the note, in place of attempting to protect their rights by giving notice at the sale made by the trust company.

It follows that the plaintiff is entitled to recover the face amount of the note.

By the terms of the report judgment for the defendants is reversed and judgment must be entered for the plaintiff for the full amount of the note with interest from March 27, 1913; and it is

So ordered.

MANUEL CORREIA & others vs. SUPREME LODGE OF THE PORTUGUESE FRATERNITY OF THE UNITED STATES OF AMERICA.

Suffolk. March 5, 6, 1914. — June 17, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Fraternal Beneficiary Corporation. Mandamus.

A hearing before the executive board of a fraternal beneficiary corporation, upon a complaint made to the Supreme Lodge that a reinstatement of a certain member by a subordinate lodge was contrary to the constitution and by-laws of the corporation, is *quasi* judicial in character and ought to be conducted in a spirit of impartiality, and a reasonable opportunity ought to be given to the subordinate lodge to learn the nature of the charges preferred and to present evidence and arguments in reply. Whether the hearing involved in the present case possessed these essential elements, it did not become necessary to decide.

On a petition for a writ of mandamus to compel the Supreme Lodge of a fraternal beneficiary corporation to reinstate a subordinate lodge of which the petitioners were members, it appeared that the vote to expel the subordinate lodge had been passed by the executive board of the Supreme Lodge, that the constitution and by-laws of the order gave a right of appeal to the Supreme Lodge itself from all decisions of the executive board relating to grievances of the subordinate lodges, and provided that a decision of the executive board should be binding "unless the Supreme Lodge reverses it on appeal," and that the petitioners for the writ of mandamus had failed to prosecute an appeal to the Supreme Lodge. The members of the executive board were members of the Supreme Lodge, but constituted a minority, a substantial majority of the board made being up of delegates of the subordinate lodges, and, although certain utterances of some members of the executive board at the hearing at which the vote of expulsion was passed were unbecoming in persons exercising a judi-

cial function, they were not such as to disqualify them from acting as members of the Supreme Lodge upon an appeal from their decision. *Held*, that the petition for the writ of mandamus was brought prematurely by reason of the failure of the petitioners first to resort to an appeal to the Supreme Lodge; because it could not be said that this mode of relief furnished by the constitution and by-laws of the order would be an idle ceremony.

RUGG, C. J. This is a petition for a writ of mandamus * to compel the reinstatement of Branch No. 9 Aurora, a subordinate lodge of the respondent fraternity of which the petitioners were members, and which has been declared dissolved and expelled by a vote of the executive board of the respondent. Thereby the petitioners have suffered financial loss in that they have been deprived of possible participation in the assets of the respondent. The respondent is a corporation organized under the laws of this Commonwealth for the purpose, among others, of paying death and disability benefits. Its constitution provides for the organization of subordinate lodges or branches, and confers upon the respondent jurisdiction and control over such subordinate lodges and members of the fraternity "with power to charter, suspend or dissolve subordinate lodges; to hear and decide all appeals; to redress all grievances arising in the lodges." The Supreme Lodge is composed of representatives from the subordinate lodges, together with the officers of the Supreme Lodge and all ex-Supreme Presidents, each person being entitled to one vote. Annual meetings of the Supreme Lodge are required, and the general supervision of the affairs of the respondent between these annual meetings is vested in an executive board of ten. A further provision is that "Any lodge may be suspended or dissolved and its charter declared without effect by the Supreme Lodge or by the board of directors. First, — For improper conduct; Second, — For neglecting or refusing to conform to constitution or laws of the Supreme or subordinate lodges, or the general laws and regulations of the association."

The root of the trouble from which this action has grown appears to have been the expulsion from the fraternity by the executive board of one Cunha, a member of Branch No. 9 Aurora. It is doubtful upon this record whether the grounds and method of that expulsion were in accordance with the rules of the fra-

* Reported by *Hammond, J.*, for determination by the full court.

ternity. But that question, so far as it has any bearing upon this proceeding, is eliminated by reason of the fact that Cunha brought a petition for a writ of mandamus in the Supreme Judicial Court in this Commonwealth for reinstatement in the respondent order. When the case came on to be heard, it appeared that he had not alleged in his petition that any of his property rights were affected and that, on being given opportunity by the court, he declined to amend his petition by setting out such financial interest; whereupon his petition was dismissed. That judgment rendered the matter *res judicata* as between Cunha and the respondent as to every issue which was or might have been litigated in that action and estopped him from contesting the matter further. *Newburyport Institution for Savings v. Puffer*, 201 Mass. 41, 46. *Foye v. Patch*, 132 Mass. 105, 110. This, however, did not prevent the respondent, if it so desired, from righting what its members might regard as an injustice to Cunha. Thereafter the members of the Branch No. 9 Aurora passed a vote which was intended to recognize Cunha's continuing membership in the fraternity, although in form it was a vote to reinstate him in membership without conforming to the requirements of the order as to new members.

Complaint against Branch No. 9 Aurora was made to the Supreme Lodge on the ground that such reinstatement was contrary to the constitution and by-laws of the respondent. A copy of this complaint, together with notice of a time and place of hearing upon its subject matter, was given to the branch, and, after hearing, the vote expelling it from the order was passed by the executive board.

There is ground for complaint as to the manner in which this hearing was conducted. The branch was given permission to be represented by a committee of three and counsel. A committee representing the branch requested that there be pointed out what provisions of the constitution or laws of the order had been violated, but they were informed that they were not "there to learn the laws or ask questions," but to answer the charges in the complaint. One member of the committee who was unquestionably a member of the order, and who at one time had been and still claimed to be a member of this branch, was told that he could not act as a member of the committee, and that he could speak

only upon the understanding that nothing he said would be considered in reaching a decision. The counsel for the branch was permitted to address the executive board at length.

Hearings of this character are *quasi* judicial. They ought to be conducted in a spirit of impartiality, without prejudice, and a reasonably full opportunity ought to be given to learn the nature of the charges preferred and to present evidence and arguments in reply. It is not necessary to determine whether the hearing in question possessed these essential elements, because for another reason the petitioners cannot prevail.

The constitution of the order provides, among other things, that the jurisdiction of the Supreme Lodge is "to hear and decide all appeals; to redress all grievances arising in the lodges." The executive board is given authority to decide "all questions of law" properly submitted to them, and their decision shall be binding "unless the Supreme Lodge reverses it on appeal." These provisions of the constitution, fairly construed, mean that a right of appeal exists from all decisions by the executive board respecting grievances of the subordinate lodges. The jurisdiction of the Supreme Lodge is also to suspend or dissolve subordinate lodges. The Supreme Lodge is the governing body which has control of the affairs of the order, including the general power of direction over the duties of the executive board. These provisions are not drawn with fulness nor with care to establish a comprehensive code for the government of the order. On this account they ought not to be given a technical or narrow construction, but to be interpreted broadly for the purpose of affording as nearly as may be a workable organization. The power of the executive board to decide "all questions of law" in a very general sense includes the determination of the question whether under the laws of the order any lodge should be suspended or dissolved during the interval between the annual meetings of the Supreme Lodge. The provision that a decision shall be binding unless the Supreme Lodge reverses it on appeal is comprehensive enough to include decisions upon a point such as has here arisen. It follows that, giving the constitution of the order a liberal construction, a right of appeal is given from a decision of the executive board, such as the one here challenged, to the Supreme Lodge.

It is a well established principle relating to beneficiary organiza-

tions like the respondent, that the rights of its members must be settled in accordance with the provisions of their constitutions, and that every remedy available within the corporation or order, must be exhausted before the aid of a court can be invoked. *Hickey v. Baine*, 195 Mass. 446, 452, and cases cited. As these petitioners have failed to prosecute an appeal to the Supreme Lodge, they are not entitled at this time to ask the assistance of the courts to vindicate their rights.

It is urged by the petitioners that the executive board and the Supreme President have manifested so much partisan bias and prejudice against them that such an appeal would be useless and that therefore they are excused from prosecuting this remedy before appealing to the court. While this contention finds some support in the record, the facts do not go quite to the extent of overcoming the principle which has been stated. Although there were utterances by some members of the executive board during the hearing on the complaint against Branch No. 9 Aurora, which were unbecoming those charged with the exercise of the judicial function, yet these circumstances do not go to the length of disqualifying them as members of another body. They there will be charged with the performance of an important duty involving the rights of many beside these petitioners. Upon the facts disclosed on this record it cannot be said that the sobering sense of final responsibility and the tempering effect of the lapse of an interval of time will not be likely to enable them to proceed, with a decorum which will win confidence, to a determination which will command respect from its inherent justice. Of course the petitioners would not be bound to go through a useless formality or to seek for justice at the hands of a tribunal which had prejudged the matter in issue. But the Supreme Lodge is made up of a considerable number of members, and apparently the executive board, although members of it, constitute a minority, and a substantial majority is made up of the delegates of the subordinate lodges. It cannot be presumed in advance that this body, composed as it will be, will fail to proceed to a consideration of the appeal with open minds intent upon giving a fair hearing and reaching a just decision, and will not be amenable to the convincing power of the evidence produced and the arguments advanced. Hence, it cannot be said that resort to the channels

of relief furnished by the constitution of the order, to which the petitioners by becoming members in it agreed to submit themselves, would be an idle ceremony. It follows that the petition has been prematurely brought and the order must be

Petition dismissed.

W. H. Barney of Rhode Island, (*J. N. Carter & W. G. Andrew* with him,) for the petitioners.

J. M. Marshall, for the respondent.

JAMES H. MCKINLEY vs. PETER R. WARREN.

Middlesex. March 10, 1914. — June 17, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Practice, Civil, New trial, Setting aside by judge of his own finding, Exceptions. Deceit. Waiver. Payment. Damages, In tort. Words, "Verdict."

A judge who has heard a case without a jury and, having ruled as matter of law that the plaintiff could not recover, has made a finding for the defendant, has power afterwards, of his own volition and without the making of any motion, to set aside his finding on the ground that it was erroneous in law and to order a new trial.

R. L. c. 173, § 112, in regard to the setting aside of verdicts in civil actions, has no application to the setting aside of the finding of a judge before whom a case was tried without a jury, the word "verdict" as used in the statute importing a trial by jury.

R. L. c. 173, § 113, in regard to the granting of new trials upon motion in cases heard by a judge without a jury, does not limit the power of a judge to set aside of his own volition any finding made by him.

Where after a trial before a judge without a jury the plaintiff and the defendant each has filed a bill of exceptions which is allowed and the exceptions are heard together by this court, if neither bill states that it contains all the evidence and it is not certain that both bills contain all the material evidence, resort will be had by this court to both bills to ascertain the material facts.

In an action for deceit, the proof of a false and fraudulent representation made by the defendant that he had an option to purchase certain shares of stock for \$10,000, whereby he induced the plaintiff to lend him \$7,000 and to take the shares as collateral security, whereas in truth the option held by the defendant was to buy the shares for \$5,000, will entitle the plaintiff to recover, this being an intentional misstatement of a present material fact, which distinguishes the case from those where a representation was made as to a price that had been paid.

Where in an action for deceit it appears that the plaintiff, by the false and fraudulent representation of the defendant that he had an option to purchase certain shares of stock for \$10,000, was induced to lend the defendant \$7,000 and to take the note of the defendant and his wife for that amount with the shares of stock as collateral security, whereas the option held by the defendant was to purchase the shares for \$5,000, which was all that they were worth, if the plaintiff, when he discovered the fraud, did not exercise his right to rescind the contract by returning the note and the certificate of stock held as collateral, but retained the collateral and received substantial sums as interest on the note and waited a number of years before bringing the action for deceit, this shows an affirmation of the contract, but is not a waiver of the fraud by which it was induced.

In an action for deceit, in which it was shown that the defendant by false and fraudulent representations induced the plaintiff to lend him a sum of money upon certain shares of stock as collateral, taking the note of the defendant and his wife for the amount of the loan, it is right for the trial judge to refuse to rule as matter of law that the plaintiff by taking the note accepted it in payment of the loan.

Where in an action for deceit it appears that the plaintiff, by the false and fraudulent representation of the defendant that he had an option to purchase certain shares of stock for \$10,000, was induced to lend the defendant \$7,000 and to take the note of the defendant and his wife for that amount with the shares of stock as collateral security, whereas the option held by the defendant was to purchase the shares for \$5,000, which was all that they were worth, it is proper for the trial judge to adopt the well established rule of damages that the plaintiff is entitled to recover the difference between the real value of the thing at the time it was received and what its value would have been if the representation had been true instead of false, which in the present case was computed to be the difference between the amount of money lent by the plaintiff and the value of the collateral.

Rugg, C. J. This case comes before us on exceptions by both the plaintiff and the defendant. It first was tried without a jury before a judge of the Superior Court,* who found that the plaintiff's testimony was to be believed, but ruled as matter of law in favor of the defendant. Thereafter he filed an order setting aside the finding for the defendant on the ground that he was satisfied that his finding was erroneous in law and ordering that the case should stand for trial. This was done through his own sense of justice without any motion therefor. This was plainly within the power of the court. A new trial may be granted for an error of law. *Loveland v. Rand*, 200 Mass. 142. In the absence of any narrowing statute a trial court is clothed with jurisdiction of its own motion to order a new trial for nu-

* Fox, J.

merous causes, including an error in law, if necessary to prevent a failure of justice. *Ellis v. Ginsburg*, 163 Mass. 143. *Forbes v. New York Life Ins. Co.* 178 Mass. 139. St. 1897, c. 472, now embodied in R. L. c. 173, § 112, is confined to the setting aside of verdicts. The word "verdict" imports trial by jury. *Bearce v. Bowker*, 115 Mass. 129. *Langley v. Conlan*, 212 Mass. 135, 139. That statute has no relation to a proceeding where there is no trial by jury. R. L. c. 173, § 113, does not limit the power of a judge sitting without a jury to set aside a finding made by him in either fact or law, of his own volition and without the making of any motion, if necessary to do justice between the parties.

This is an action of tort for deceit in the borrowing of money. The judge who heard the case at the new trial * made a finding of facts in substance to the effect that the defendant induced the plaintiff to lend him \$7,000 through the false representation that he had an option to purchase stock in a corporation for \$10,000 and that, as he could raise only \$3,000, he needed to borrow \$7,000 to make up the purchase price, and that as collateral security for a loan for this amount he would give a joint note of himself and his wife and deposit the certificate of the stock so to be purchased. In fact, the defendant's option was to purchase the stock for \$5,000, which he well knew at the time of making the representations. He made the representations with intent to deceive the plaintiff and with intent that the plaintiff should rely upon them, and the plaintiff in fact believed and relied upon them, and lent the money accordingly.

The plaintiff and the defendant filed separate bills of exceptions, but neither states that it contains all the material evidence. It is not certain that both bills of exceptions contain all the material evidence. Resort may be had to both bills to ascertain the facts under such circumstances.

The defendant contends that the finding was not warranted by the evidence. In the plaintiff's bill of exceptions it is said that the plaintiff testified that the defendant told him he had "an agreement for the purchase of the stock for \$10,000." The defendant's letter to the plaintiff refers to his "option" for the

* *Jenney, J.*

purchase of the stock. The findings of fact cannot be set aside as unsupported by the evidence.

It further is argued that the representation amounted to no more than a statement as to cost of the stock to the person making the representation, and that under the rule in this Commonwealth, as laid down in *Hemmer v. Cooper*, 8 Allen, 334, and similar cases, such representation will not support an action for deceit. It has been said repeatedly that legal immunity for falsehoods in the course of commercial transactions will not be extended beyond the bounds already established. *Mabardy v. McHugh*, 202 Mass. 148, and cases there cited. *Noyes v. Meharry*, 213 Mass. 598. The representation by the defendant in the case at bar was that he had an option to buy the stock for \$10,000. He well knew that he did not have such an option. This was a representation of an existing fact calculated to influence the mind of one who was solicited to lend money upon the security of the stock as collateral. This might have been found to be a misstatement of a present material fact. It was not a representation as to the price paid and is distinguishable in its nature from the cases upon which the defendant relies.

When the plaintiff discovered the fraud which had been practiced upon him, two courses were open: (1) to rescind the contract by tendering a return of the note and certificate of stock held as collateral, or (2) to affirm the contract and sue for the damages sustained. The plaintiff followed the latter course. He did not immediately return what he had received under the contract and demand that which he had paid, but he retained the fruits of the contract and received substantial sums of interest upon it, and waited several years before bringing action. This conduct was equivalent to an affirmation of the contract and precluded him from rescinding it after the lapse of so long a time. *Bassett v. Brown*, 105 Mass. 551. Affirmation of the contract standing alone is no waiver of the fraud by which it was induced. *Whiting v. Price*, 172 Mass. 240.

The taking by the plaintiff of the note of the wife of the defendant was not conclusive payment for the loan such as to preclude reliance upon the fraud which induced him to make the loan. The rule is that the giving and taking such a note, without its subsequent negotiation, merely is presumed to be a payment

of the debt, but this presumption may be rebutted by the circumstances or conduct of the parties and is not applicable as of course in all cases. *Cary Brick Co. v. Wheeler*, 210 Mass. 338. *Davis v. Parsons*, 157 Mass. 584. The judge was warranted in refusing to rule as matter of law that the note was accepted in payment of the loan.

The rule of damages adopted by the trial judge to the effect that the plaintiff was entitled to recover the difference between the real value of the thing at the time it was received and what its value would have been if the representation had been true instead of false, is well established in this Commonwealth. *Morse v. Hutchins*, 102 Mass. 439. *Thomson v. Pentecost*, 210 Mass. 223. There was no error in its application to the facts. The plaintiff's maximum claim as stated in his declaration was the amount he had lent. The finding that the real value of the collateral at the time of its deposit was \$5,000 cannot be said to have been unsupported by evidence. The finding for the plaintiff was for the difference between these two sums with interest from the date of the writ.*

What has been said disposes of all the exceptions of each party, which have been argued, either as being wrong in law or inapplicable in view of the facts as found. Those which have not been argued are treated as waived.

Plaintiff's exceptions overruled.

Defendant's exceptions overruled.

W. D. Regan, for the plaintiff.

H. D. Crowley, for the defendant.

* The amount of the finding was \$2,184.

JOHN E. COTTER vs. NATHAN AND HURST COMPANY.

Suffolk. March 11, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & CROSBY, JJ.

Unlawful Arrest. Agency.

In an action against a corporation for unlawfully causing the arrest of the plaintiff in a civil action upon a false affidavit of the defendant's president that the plaintiff was about to leave the Commonwealth, it appeared that the defendant was a creditor of the plaintiff and sent an agent, who was employed by the defendant "to look after the outside accounts," to interview the plaintiff, that this agent reported to the defendant's president that the plaintiff said that he could not pay his debt to the defendant but that he had some mines in Nova Scotia and was going there to look after them and that, if the agent would wait, he would send him the money. The plaintiff testified that he said nothing to the agent about going to Nova Scotia or anywhere out of the Commonwealth. The defendant's president sent the agent to see the attorney of the company, and thereafter, acting on the advice of counsel, the defendant's president signed and made oath to the affidavit on which the plaintiff was arrested. *Held*, that on these facts the plaintiff was entitled to have the jury instructed that, if the report of the agent to the defendant's president that the plaintiff was about to leave the Commonwealth was false, the agent's knowledge of its falsity was imputable to the defendant, and that, if the defendant acted on the advice of counsel in making the arrest, but had failed to disclose to its counsel the true conversation between the defendant's agent and the plaintiff, its acting upon the advice of counsel was no defense. *Held, also*, that the jury should have been instructed that, if a rational person, having the knowledge that the defendant had through its president and its agent, would not have had reasonable cause (as defined by the judge) to believe that the plaintiff intended to leave the Commonwealth, then, if the other material facts were proved, the plaintiff might recover.

Tort against a corporation for unlawfully causing the arrest of the plaintiff on civil process in an action of contract. Writ dated September 20, 1911.

In the Superior Court the case was tried before *Pratt, J.* The evidence and also the requests of the plaintiff for instructions, which were refused by the judge, are described in the opinion. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

C. H. Sprague, for the plaintiff, submitted a brief.

W. H. Brown, (*A. S. Neal* with him), for the defendant.

RUGG, C. J. This is an action of tort in which the plaintiff seeks to recover from the defendant corporation damages for maliciously causing his arrest on mesne process. The plaintiff was arrested on a writ sued out by the defendant against him in an action of contract, on the ground that he was going to leave the State. The plaintiff was a debtor to the defendant upon a contract of sale. There was testimony tending to show that the defendant had made very considerable effort to find the plaintiff, without success, and that the defendant's president, receiving information that the plaintiff was at the Parker House in Boston, sent one Waitt to interview him. Waitt's general employment by the defendant was "to look after the outside accounts. That was his entire business. . . . He was an outside man and did some inside work too." The report of Waitt to the defendant's president (as testified by the latter) was, "I asked Mr. Cotter for the money and he said he couldn't pay it, and he said, 'I have got some mines down in Nova Scotia that I am going down to look after,' and he said that 'if you will wait I will send you the money.'" Thereupon the defendant's president sent Waitt to see its attorney; and thereafter, acting on the advice of counsel, the president of the defendant signed and made oath to the affidavit of arrest before a master in chancery. The plaintiff denied that he made any statement to Waitt about going to Nova Scotia or anywhere out of the Commonwealth, and testified that he simply said that he was at Young's Hotel. The plaintiff requested instructions to the jury (which were denied) in various forms, to the effect in substance, that knowledge on the part of Waitt of the falsity of the report made by him to the defendant's president (if it was false) that Cotter was going to leave the State was imputable to the defendant, and that, if the defendant acted on advice of counsel in making the arrest and failed to disclose to him the true conversation between Waitt and Cotter, then advice of counsel was not a defense.

Under the circumstances of this case the substance of these requests should have been granted. Waitt was the agent of the defendant for the purpose of the interview with Cotter. He was sent for the express purpose of talking with him about the account and ascertaining the facts respecting it, on which action by the defendant might be based. On reporting this conversation

to the defendant's president, he was sent by the latter to the counsel for the defendant for the purpose of making full disclosure of the substance of the conversation, in order that the counsel might determine what ought to be done in the interests of the defendant. He thus was constituted agent respecting this particular matter by the course of conduct between him and the executive officer of the defendant, whatever may have been the scope of his general employment. The president of the defendant apparently made no detailed representations to the counsel, but adopted and relied upon those made by Waitt. While it is true that an agent commonly is not authorized to act respecting arrests of debtors of his principal, nor the bringing of actions against them, the facts in the case at bar disclose a situation where it was the duty of the agent to gather and communicate information touching the particular matter in the discharge of his duty as agent. To use the terse phrase of Lord Halsbury in *Blackburn, Low & Co. v. Vigors*, 12 App. Cas. 531, at page 537, "When a person is the agent to know, his knowledge does bind the principal." The extent of Waitt's authority was to ascertain and report the facts. He was not clothed with power to institute proceedings, nor to make the affidavit. But so far as he had knowledge of facts which would have shown that there was not reasonable cause to believe that Cotter intended to leave the State, the defendant is bound by that knowledge. *Innerarity v. Merchants' National Bank*, 139 Mass. 332, and cognate cases, where knowledge of the agent has been held not to be knowledge of the principal because the agent is perpetrating an independent wrong on his own account for a supposed advantage to him hostile to his employer, are not applicable because there is nothing in the evidence to indicate that Waitt was unfaithful to his employer through any personal interest. The jury should have been instructed that, if a rational person having the knowledge which the defendant through its president and its agent, Waitt, had, would not have had reasonable cause (as that should be defined to be, *Good v. French*, 115 Mass. 201,) to believe that Cotter intended to leave the State, then so far as that branch of the case went, the plaintiff might recover.

No other error is disclosed upon this record.

Exceptions sustained.

ARTHUR W. WHITNEY vs. HUNT-SPILLER MANUFACTURING
CORPORATION.

Suffolk. March 11, 20, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Practice, Civil, New trial. Rules of Court. Words, "Extend."

Under Rule 41 of the Superior Court the time for filing or giving notice of a motion for a new trial "may be extended" by the judge who presided at the trial, although the motion for such extension was made after the expiration of the three days after the verdict within which the rule requires that a motion for a new trial shall be filed.

The word "extend" when used in rules of court and statutes in relation to periods of time has been interpreted not to imply the existence of an unexpired portion of the period.

TORT for personal injuries. Writ dated December 18, 1912.

At the trial in the Superior Court before *Stevens, J.*, the jury returned a verdict for the plaintiff in the sum of \$4,000 on October 31, 1913. On the same day a motion for a new trial was filed by the defendant, but no notice or copy of the motion was given to the plaintiff or the plaintiff's counsel within three days after the return of the verdict as required by Rule 41 of the Superior Court. On November 8, 1913, the defendant asked the judge for further time within which to give the plaintiff's counsel a copy of the motion for a new trial. This motion was granted, and the plaintiff excepted. A copy of the defendant's motion for a new trial then was given to the plaintiff's counsel. On November 13, 1913, the plaintiff filed a motion to dismiss the motion for a new trial. There was a hearing on the defendant's motion for a new trial and on the plaintiff's motion to dismiss, and the plaintiff asked the judge to make the following rulings:

"The court has no power to grant further time for the giving of a copy of motion for new trial to the opposing counsel after three days after expiration from the date on which the verdict was returned.

"The power of the court to grant further time within which counsel filing a motion for new trial may deliver a copy of it to

opposing counsel must be exercised by the court before three days have expired after the date on which the verdict was returned."

The judge refused to make these rulings. He denied the plaintiff's motion to dismiss, and upon the defendant's motion for a new trial made the following order: "Motion allowed and new trial granted unless the plaintiff elects within ten days to remit all damages above \$2,000, the new trial to be limited to the amount of damages. This motion is allowed because the damages were grossly excessive, chiefly consisting of an injury to the right index finger."

The plaintiff excepted to the refusal of the rulings requested by him, to the denial of his motion to dismiss and to the order on the defendant's motion for a new trial, and the judge reported the case for determination by this court.

Rule 41 of the Superior Court is as follows: "No motion for a new trial shall be sustained in a civil action after verdict, either on account of any opinions or decisions of the judge, given in the course of the trial, or because the verdict is alleged to be against evidence or the weight of evidence, unless within three days after the verdict is returned, the counsel of the party complaining of the proceedings or of the verdict shall file a motion for a new trial, specifying the grounds of his complaint, and cause a copy of the motion to be delivered to the adverse counsel on the day the same is filed or within such further time as the court may allow. For cause the time for filing such motion may be extended by the court."

F. R. Mullin, (*P. F. Spain* with him,) for the plaintiff.

J. Lowell, (*R. W. Hall* with him,) for the defendant.

RUGG, C. J. The only question presented by this record is whether a judge of the Superior Court has power to extend the time within which a motion to set aside a verdict and to grant a new trial may be filed, when no such motion has been filed within three days after the return of the verdict. Rule 41 of the Superior Court provides that "no motion for a new trial shall be sustained in a civil action after verdict . . . [in enumerated cases] . . . unless within three days after the verdict is returned" a motion therefor is filed. "For cause the time for filing such motion may be extended by the court." This question must be answered in the affirmative on the authority of *Dolan v. Boott Cotton Mills*,

185 Mass. 576. That case decided that Rule 18 of the Superior Court, as it then was, (now Rule 16,) which provided that "The notice that a party desires a trial by jury shall be filed not later than ten days after the time allowed for filing the answer . . . unless the court by special order shall extend the time" meant that the court had discretionary power to make an order permitting a trial by jury after the expiration of the ten days, even although no application for it had been filed within that time. The words of these two rules are almost identical, the decisive one, "extend," being the same. As pointed out in *Dolan v. Boot Cotton Mills*, the word "extend" in similar rules or statutes has been interpreted not to imply the existence of an unexpired portion of the period. *Cleverly v. O'Connell*, 156 Mass. 88. *Haynes v. Saunders*, 11 Cush. 537. The present rule is dealing with the exercise of a right inherent in the right of trial by jury secured by the constitution. *Opinion of the Justices*, 207 Mass. 606.

It hardly is to be expected that the court would deprive itself absolutely of the power to set aside a verdict which its sound judicial discretion should pronounce so unjust that it ought not to be permitted to stand. The reason why "extend" should be given a meaning sufficiently broad to permit the exercise of the power after the expiration of the period limited are quite as strong in the case at bar as in any of the decisions cited. As is pointed out in *Hack v. Nason*, 190 Mass. 346, the rule respecting the allowance of additional time for filing exceptions is different and not inconsistent with that here followed, for in that case the motion must be presented within the initial period allowed.

Order allowing motion for new trial to stand.

DOLIVER S. SPAULDING, trustee, vs. INHABITANTS OF PLAINVILLE.

Norfolk. March 12, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & CROSBY, JJ.

Eminent Domain. Damages, For property taken or injured under statutory authority. Limitations, Statute of. Plainville. Water Rights. Water-works.

Upon the water commissioners of the town of Plainville, acting under authority given to them by St. 1908, c. 404, §§ 2, 9, which was accepted by the town, purchasing land adjacent to Ten Mile River and driving wells there for the purpose of a town water supply, the owner of a mill pond which was fed by the river and by water which fed that river became entitled to maintain, under § 4 of the statute, which gives a right of recovery for "all damages to property . . . by anything done . . . under authority of this act," a petition for the assessment of damages which he suffered by reason of water being diverted from his pond by the wells, although none of his land was taken by the town and although no certificate was filed as required by § 3 of the statute, providing that, within ninety days "after the taking of any . . . water rights, water sources or easements" the town shall file and cause to be recorded a description thereof and a statement of the purpose of the taking, signed by the commissioners; because the town by its purchase of land did not acquire the rights of an owner as to waters percolating through the land, and, its acts with respect to such waters therefore being capable of justification only on the assumption that it took such waters, it cannot set up in defense to the petition the fact that the town did not make a formal taking.

A petition against a town for the assessment of damages resulting from the taking, by means of wells driven for purposes of a water supply, of water which otherwise would have percolated into a river which supplied a mill pond of the petitioner, where no final certificate of taking was filed and recorded as the statute requires, is brought within the two years' period of limitation from the time of the taking provided by the statute, if it is brought within two years from the time of the driving of permanent wells, although, more than two years before it was brought, temporary test wells had been driven by the town.

PETITION, filed on August 19, 1910, for the assessment of damages for the diversion of water from the petitioner's pond by the defendant in the construction of its system of waterworks.

In the Superior Court the case was tried before Fox, J. Material facts are stated in the opinion. At the close of the evidence the judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

E. J. Whitaker, for the petitioner.

W. D. Turner, for the respondent.

LORING, J. By St. 1908, c. 404, § 2, the defendant town was authorized to "take, or acquire by purchase or otherwise, . . . the waters of any pond or stream or of any ground sources of supply by means of driven, artesian or other wells within the limits of the town, and the water rights connected with any such water sources;" by § 4 it is provided that: "Said town shall pay all damages to property sustained by any person or corporation by the taking of any land, right of way, water, water source, water right or easement, or by anything done by said town under authority of this act;" and by § 9 it is provided that: "All the authority granted to the said town by this act and not otherwise specifically provided for shall be vested in said water commissioners, who shall be subject however to such instructions, rules and regulations as said town may impose by its vote." It appears by the report in this case that the act was accepted by the defendant town, and that water commissioners were duly elected.

It further appears that these water commissioners, in November, 1908, bought some six acres of land which was bounded for a distance of more than thirteen hundred feet by the centre of Ten Mile River and that this land was conveyed to the town. Thereafter, seven wells were driven on this land and water was pumped from these wells into a standpipe and the service pipes of the town, which had been constructed and laid under the act.

As we understand the report, it was admitted that the petitioner was the owner of a mill pond which was fed by the water of Ten Mile River and by waters which fed that river. On the nineteenth day of August, 1910, he brought a petition for damage caused to this mill pond by the pumping of water from the seven driven wells mentioned above, and at the trial he offered to prove "that the water in the defendant's well [wells] came by percolation from the Ten Mile River, above the dam of the petitioner and from water intercepted by said wells, which would otherwise have flowed into the said Ten Mile River and into the petitioner's mill pond above said dam; and that he had suffered material damage to his property thereby." The presiding judge, being of the opinion that the petitioner could not maintain his petition, directed a verdict for the defendant and reported the case to this court.

The defense set up in this case is: "That no certificate of the

taking of said land was ever filed in the Registry of Deeds for the county of Norfolk, and that no certificate of the taking of any water or water rights of the petitioner was ever so filed" as required by § 3.*

We are of opinion that the petitioner is entitled to maintain his petition on the principle of *Cowdrey v. Woburn*, 136 Mass. 409, and also on the principle of *Sheldon v. Boston & Albany Railroad*, 172 Mass. 180, *Penney v. Commonwealth*, 173 Mass. 507, and *Hyde v. Fall River*, 189 Mass. 439.

The doctrine of *Cowdrey v. Woburn*, *ubi supra*, is that where a person has done an act which can be justified only on the assumption that he has taken the property of another, the owner of the property can proceed against that person on the ground that the property has been taken, and that it does not lie in the mouth of that person to set up in defense that he has not done the formal act which the Legislature required him to do if he took the property.

In the case at bar the defendant town did not have the rights of an owner with respect to percolating waters within the six acres which it obtained by deed. *Cowdrey v. Woburn*, *ubi supra*. *Hittinger Fruit Co. v. Cambridge*, *ante*, 220.

The second principle on which the petitioner is entitled to recover in this action is that St. 1908, c. 404, under which the respondent acted is a statute which gives compensation to persons who are in fact damaged by "anything done . . . under authority of this act," whether their property is taken or not, as was decided in *Sheldon v. Boston & Albany Railroad*, *Penney v. Commonwealth*, and *Hyde v. Fall River*, *ubi supra*.

It is not necessary to consider with particularity the question when in the case at bar the two years began to run within which petition for damages must be brought. The wells here in question were driven after August 22, 1908, and the petition was brought

* "Section 3. Said town shall, within ninety days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds for the county and district within which such land or other property is situated, a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for."

on August 19, 1910. The driving of test wells in July or the first of August, 1908, being for temporary purposes, was not a taking. *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365.

In accordance with the terms of the report the entry must be
Verdict set aside; new trial ordered.

EDWIN R. JUMP, trustee, vs. JOHN H. SPARLING.

Suffolk. March 12, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & CROSBY, JJ.

Bills and Notes. Negotiable Instruments Act. Corporation, Officers. Bankruptcy, Rights of trustee.

Under the provision of the negotiable instruments act in R. L. c. 73, § 37, that "where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability," the treasurer of a corporation, who signs a negotiable promissory note with his own name adding the word "Treasurer" followed by the name of the corporation, executing the note at a meeting of and by authority of the directors of the corporation, believing that he is executing a note of the corporation, and the note thereupon being given in payment of a claim against the corporation, is not liable personally on the note and has a good defense at law if he is sued on it.

Under U.S. St. 1910, c. 412, § 8, a trustee in bankruptcy, when suing on a negotiable promissory note of which his bankrupt is the payee, has the rights that an attaching creditor would have, which can be no greater than those of the bankrupt.

CONTRACT by the trustee in bankruptcy of David F. Burns on the promissory note set forth in the opinion, of which that bankrupt was the payee. Writ in the Municipal Court of the City of Boston dated July 24, 1913.

The defendant's answer is described in the opinion. In the Municipal Court the case was tried before *Duff, J.*, who ruled that upon the evidence, which is described in the opinion, the defendant signed the note in a representative capacity and not as a

principal, and that the plaintiff was not entitled to recover. At the request of the plaintiff he reported the case for determination by the Appellate Division.

The Appellate Division made an order that the report be dismissed; and the plaintiff appealed.

W. H. Thorpe, for the plaintiff.

O. Storer, for the defendant.

RUGG, C. J. This is an action upon a promissory note of the tenor following:

"\$596.20

Boston, Nov. 19th, 1908.

On demand after date we promise to pay to the order of David F. Burns Five Hundred and ninety-six 20/100 dollars. Payable at State Street Trust Co. Boston Mass.

Value received with interest.

J. H. Sparling, Treas.

Stratton Engine Co.

David F. Burns, Pres.

Stratton Engine Co."

The plaintiff is the trustee in bankruptcy of the payee. Oral evidence was received to the effect that both Burns and the defendant signed the note in their respective capacities as officers of the Stratton Engine Company, that it was executed at a meeting and under the direction of the board of directors of that company, that both Burns and the defendant believed they were executing the note of the company, that the note was given in payment of a claim against the company, and that the defendant received no consideration for his signature. The answer pleaded these facts by way of equitable defense and averred further that, if the phraseology of the note had the legal effect of binding him personally, there was accident and mistake in the use of such words. The equitable defense was properly pleaded under R. L. c. 173, § 28, as amended by St. 1913, c. 307; but, as later is pointed out, the facts set forth constituted a legal defense.

Under the law previous to the enactment of the negotiable instruments act, the defendant corporation would not have been held on this note. It would have been not the note of the corporation, but simply the personal note of the two individuals who signed. *Davis v. England*, 141 Mass. 587. *Tucker Manuf.*

Co. v. Fairbanks, 98 Mass. 101. A change in the law in this respect has been wrought by that act. R. L. c. 73, § 37, is as follows: "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability." These words plainly imply that if the person signing a promissory note adds to his signature words describing himself an agent or as occupying some representative position which at the same time discloses the name of the principal, he shall be exempted from personal liability, while, if he omits the name of the principal, although adding words of agency, he will be held liable personally and the words of agency will be treated simply as *descriptio personæ*. In this respect the common law rule of this Commonwealth whereby agents bind themselves by a form of signing a note such as the one at bar, even though acting with authority, *Haverhill Mutual Fire Ins. Co. v. Newhall*, 1 Allen, 130, is abrogated. The agent now relieves himself from liability by a form of signature whereby he is described as agent of a disclosed principal. This conclusion is not at variance with *Tuttle v. First National Bank of Greenfield*, 187 Mass. 533, and *Dunham v. Blood*, 207 Mass. 512, nor with *Carr v. Leahy*, 217 Mass. 438. Where a trustee executes a note in his trust capacity he is liable personally. Of course, if one signs as agent when he is not, he is liable as principal.

Although the law on this point in other jurisdictions before the passage of the negotiable instruments act may have differed from that of this Commonwealth, the result here reached appears to be in harmony with the rule now generally prevailing under that act. See *American Trust Co. v. Canevin*, 107 C. C. A. 543; *Briel v. Exchange National Bank*, 172 Ala. 475; *Western Grocer Co. v. Lackman*, 75 Kans. 34; *Phelps v. Weber*, 55 Vroom, 630; *Megowan v. Peterson*, 173 N. Y. 1; *Citizens National Bank v. Ariss*, 68 Wash. 448.

The plaintiff as trustee in bankruptcy has no greater rights in this respect than the bankrupt himself had. U. S. St. 1910, c. 412, § 8, relied upon by him, confers upon the trustee the rights of an

attaching creditor. Such rights in this respect are no greater than those of Burns suing as an individual plaintiff.

Order dismissing the report affirmed.

FRANCIS C. WELCH, trustee, *vs.* ARTHUR D. HILL, trustee,
& others.

Suffolk. March 12, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & CROSBY, JJ.

Trust, Construction, Trustee's accounts. Words, "Annuity."

In a will, proved in 1885, the testator gave to F, a woman, who was a trusted and faithful inmate of his household to whom all members of his family had been and were much attached and were greatly indebted for many attentions depending more upon intelligent affection than upon hired service, the sum of \$10,000, and placed in the hands of trustees "a sufficient sum in trust to invest to pay to" her \$1,200 a year during her life, and, the will read, "at her decease, I order the principal, required to provide this annuity . . . to be added" to a trust fund created by the will for the benefit of the testator's niece. The will also provided that, if F did not survive the testator, "my will is that \$25,000 be added to the" trust fund for the benefit of the niece. The will contained a residuary clause disposing of all the testator's property not disposed of by its other provisions. The executor of the will set apart \$32,000 as a principal sum sufficient in the exercise of a wise and conservative judgment to provide the \$1,200 a year for F. F lived for twenty-eight years, and during that period there accumulated from that fund, in excess of the \$1,200 a year, income amounting to \$5,000. On the death of F, the trustees sought instructions as to what disposition should be made of the principal sum and the accumulated income. *Held*, that all that was given to F beyond the legacy of \$10,000 was an annuity of \$1,200; that the entire principal set apart by the executor to produce that annuity belonged on the death of F to the trustees for the niece; and [that the excess income, not being disposed of by the will, should be paid to the administrator with the will annexed of the estate of the testator not already administered, to be distributed in accordance with the provisions of the residuary clause of the will.

In the foregoing suit in equity for instructions, it also *was stated* that the trustees of the fund set apart to pay the annuity to F should have kept separate accounts of the principal and of the accumulation of excess income.

RUGG, C. J. This is a petition for instructions as to the disposition of the principal and accumulated income of a fund held by the trustee under the will of the late Henderson Inches,

for the benefit of Ruth T. Field. The controversy arises under the following clause in the testator's will:

"To Ruth T Field in recognition of her long & faithful aid in our family and in token of my appreciation of her attention during the health & sickness and at the deathbeds of so many of its members I bequeath if she survives me the sum of Ten thousand dollars and in addition I give to Edward D Sohler & to Martin B Inches a sufficient sum in trust to invest to pay to said Ruth T Field the sum of twelve hundred dollars per annum in quarterly payments during her life and at her decease, I order the principal, required to produce this annuity of twelve hundred dollars per annum to be added to the trust fund of seventy five thousand dollars hereinbefore created for the benefit of my niece Caroline I. Hill & her issue & to be incorporated with and subject to the conditions & directions for the disposition and management of said trust fund for the benefit of my said niece Caroline I and her heirs. If the said Ruth T Field does not survive me, my will is that twenty five thousand dollars be added to the bequests of seventy five thousand dollars in trust for Mrs Caroline I. Hill making the trust fund established for her one hundred thousand dollars in amount and I direct that my taxes to which the last three legacies may be subject shall be paid out of the residue of my estate, so that each of the recipients thereof shall receive the amount bequeathed without diminution."

The facts are that the executors of the will of Henderson Inches, at the time of his death in 1885, set apart \$32,000 as a principal, in the exercise of their judgment, sufficient to provide the required annual payment of \$1,200 to Ruth T. Field. It is conceded that the setting apart of this sum, in view of the then prevailing rate of interest upon trust investments and the general opinion among men of sound judgment as to the rate likely to be obtainable in the future on such investments, was wise and conservative conduct and is not now open to review. During the twenty eight years since the fund was set apart there has been an accumulation of nearly \$5,000 of income in excess of the annual payment required to Ruth T. Field.

The executors of the will of Ruth T. Field claim this accumulated income. The administrators *de bonis non* with the will annexed of Henderson Inches claim the accumulated income and

the principal in excess of \$25,000. The trustee for Caroline I. Hill under the will of Henderson Inches, claims the entire principal and accumulated income.

The true construction of the clause of the will is that it created an annuity for the benefit of Ruth T. Field during her life. The testator describes it as an "annuity." The description of the way in which it is to be provided and paid makes it an annuity. An annuity imports the payment annually of a fixed sum. The language of this will shows that it is to be paid each year without diminution or contingency. It cannot be satisfied by the payment of the income of a fund or of any fluctuating or variable sum. *Bates v. Barry*, 125 Mass. 83. *Brimblecom v. Haven*, 12 Cush. 511. *Swett v. Boston*, 18 Pick. 123. *Wiggin v. Swett*, 6 Met. 194. Although the testator directed the setting apart of a trust fund ample in amount to meet the requirement of the annuity, the words used do not imply that the sum to be received by her is to vary in accordance with the income of the fund. The intent disclosed is rather one of precaution to make certain that his executors shall set apart a fund sufficient to produce the annuity. This would have been their duty apart from any express testamentary provision, *Cummings v. Cummings*, 146 Mass. 501, 508, but the manifest design of the testator was to make this assurance certain so far as that was possible through specific direction on his part. This conclusion is affirmed by the relations between the testator and the annuitant. She had been a trusted and faithful inmate of his household, to whom all members of his family, including many who had predeceased him, apparently were much attached, and to whom they were greatly indebted for many attentions which depend more upon intelligent affection than upon hired service. In providing for such a person a testator naturally would make sure as nearly as possible the payment of a definite sum without uncertainty or casualty. On the other hand, there are no words in the will which indicate that the entire income of the fund is to be given to the annuitant. A substantial legacy is given outright. The entire remaining testamentary design is expressed in the creation of the annuity. The language of the will in this respect is plainly distinguishable from that under consideration in *Russell v. Loring*, 3 Allen, 121, where the direction was to pay the "dividends, interest or income arising" from

a fund to be established. Although that was recognized as a close case, the words just quoted were held decisive of an intent to give the whole income. As was said in *May v. Bennett*, 1 Russ. 370, the question in the case at bar is "whether the bequest . . . is to be considered as the bequest of an annuity, or as the bequest of the income of a sum of money, which is directed to be set apart." For the reasons stated, the present will presents an instance of an annuity. *Carmichael v. Gee*, 5 App. Cas. 588. *In re Howarth*, [1909] 1 Ch. 485, 489.

The conclusion follows that the testamentary provisions, being a true annuity, the representatives of the estate of Ruth T. Field are not entitled to any part of the fund.

The testator ordered at the death of the annuitant "the principal, required to produce this annuity of twelve hundred dollars per annum to be added to the trust fund" created by another clause in the will for the benefit of Mrs. Hill, saying also that, in the event of the decease of the annuitant before the testator, \$25,000 should be added to the trust fund for Mrs. Hill. It is contended that this is a testamentary declaration that the amount to be added to this trust in no event shall exceed \$25,000. But the language is not reasonably susceptible of this construction. It is simply a determination of the amount of the Hill trust in the event that there is no occasion for the establishment of the annuity. It does not cut down or change the declaration that in case it becomes necessary to establish a fund for the production of the annuity the principal of that fund shall go to the Hill trust on the termination of the annuity. It is urged also that the words used by the testator mean that the principal to be so added shall not exceed a sum which in the light of the actual income received is shown to have been sufficient to produce the amount of the income. But this is a construction too refined to be placed upon the words used. The testator was dealing with practical matters in a practical way. It must have been apparent to him that no one could forecast with accuracy the precise amount of principal needed to produce the annuity. A care to have the fund large enough for that end is manifestly his general purpose. It is the principal of that particular fund which he gives over. As sound judgment has been used in the determination of the amount of that fund, there is no occasion to speculate as to what

might have been the thought of the testator if the exact event which has come to pass had been in his mind. What he said in substance was that the principal of that fund, established as it ought to be established, should be added to the Hill fund. This fund having been reasonably determined, as is conceded, the words of the will are that it shall be added to the Hill fund. There is no room for the application of the rule adopted in *Edwards v. Edwards*, 183 Mass. 581, by a computation of the sum which at a reasonable rate of interest would have produced the annuity. This conclusion finds support in a consideration of the results which might have flowed from the honest exercise of a sound judgment in fixing an amount of the fund, conceivably proven by a different financial history than that of these last twenty eight years to have been too small to produce the necessary annuity. Probably the annuitant would have been entitled to have the designated annual payment made up out of the principal. *Smith v. Fellows*, 131 Mass. 20. *In re Howarth*, [1909] 2 Ch. 19. *Moore v. Alden*, 80 Maine, 301. If thus the principal had been reduced the rule contended for could not have been followed.

The question of difficulty is the disposition to be made of the accumulated income. Apparently the happening of this contingency of income not needed for the annuity was not in the mind of the testator. At all events, he makes no explicit provision touching it. This accumulation is not rightly included in the description of that which is to be added to the Hill trust, for it is not a part of "the principal, required to produce this annuity." It was not originally a part of that principal and is merely an increment out of its income in addition to that required to pay the annuity. The testator does not give to the Hill fund the remainder of the trust established for the annuitant. He confines his benefaction in this regard to the "principal." Nor can it be said that the intent is clear that as to the sums provided for by this clause the annuitant and the Hill trust alone are beneficiaries. The donative words do not include all there is of the fund. It is not the province of a court in construing a will to determine what the testator would have done if the exact situation which has arisen had been in his mind in writing the will, but rather to determine the meaning of the words he actually used to express his purpose. *Sanger v. Bourke*, 209 Mass. 481. There is in

this will a true residuary clause, which includes all estate not disposed of by other parts of the will, and thus disposes of all the testator's property. Hence the presumption against intestacy affords no aid. This is not a case where a reading of the whole "will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words," so that the court may supply the defect by implication to give effect to an intention sufficiently declared by the whole instrument, as in *Metcalf v. Framingham Parish*, 128 Mass. 370. It hardly seems justifiable to infer from the words he used that the testator meant to have the accumulated income added to the Hill trust. The conclusion follows that a decree should be entered directing the petitioner to pay the principal of the fund to the trustee of Mrs. Hill and the accumulated income to the administrator *de bonis non* with the will annexed of the estate of the testator for distribution under the residuary clause.

A question appears to be made as to depreciation in some of the investments. We do not undertake to settle that matter, but simply to lay down the principles by which the controversy may be determined if any arises. The testator directed the creation of the principal of the trust fund by giving to his trustees "a sufficient sum in trust to invest to pay" the annuity. That sum was set apart rightly as has been shown. That principal was given over at the death of Ruth T. Field by these testamentary words: "I order the principal, required to produce this annuity . . . to be added to the trust fund . . . hereinbefore created for the benefit of my niece." The principal of that fund ought to have been kept separate as matter of trust accounting. It is that fund, whether appreciated or depreciated in value, which must be added to the Hill trust. It is the surplus of income above that needed to pay the annuity which goes under the residuary clause. The account of this surplus ought to have been kept separate, for it goes to a different beneficiary than the principal fund. It is not necessary to determine what course might have been pursued if the income of the principal at any time had been insufficient to produce the annuity, for that contingency did not arise. Seemingly the trustees have not kept these two funds distinct. But it now becomes necessary to separate them in accordance with the interpretation of the will here made. If the parties are unable to agree upon the

amounts due to each, the case may be heard before a single justice or sent to a master for determination of this point.

So ordered.

A. D. Hill, (*L. Goldberg* with him,) stated the case.

R. F. Sturgis, for the administrator *de bonis non* of the estate of the testator, Henderson Inches.

B. Corneau, for the executors of the will of Ruth T. Field.

ESTHER SANDLER *vs.* BOSTON ELEVATED RAILWAY COMPANY & trustee.

Suffolk. March 13, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & CROSBY, JJ.

Practice, Civil, Venue. Trustee Process. Statute, Repeal.

Since St. 1904, c. 320, providing that "An action against a city, town, person, or corporation to recover for injury or damage received in this Commonwealth by reason of negligence . . . shall be brought in the county in which the plaintiff lives or has his usual place of business, or in the county in which the alleged injury or damage was received," such an action cannot be brought in any county other than is specified in that statute even though it be brought by trustee process and a trustee named in the writ has a usual place of business in such other county, because that statute repealed inconsistent provisions of R. L. c. 189, §§ 1, 2, which provided that such an action might be brought by trustee process and, if so brought, should be brought in the county where a trustee dwelt or had a usual place of business.

TORT, by trustee process, for personal injuries alleged in the declaration to have been received in Malden in the county of Middlesex and to have been caused by negligence of the defendant. The writ alleged that the plaintiff was of Lawrence in the county of Essex and that the trustee was the National Shawmut Bank of Boston. Writ dated November 5, 1913.

The defendant moved to dismiss the action on the ground that it was improperly brought in the county of Suffolk, under St. 1904, c. 320, which, so far as material, reads as follows: "An action against a city, town, person, or corporation to recover for injury or damage received in this Commonwealth by reason of

negligence . . . shall be brought in the county in which the plaintiff lives or has his usual place of business, or in the county in which the alleged injury or damage was received."

The motion was allowed by *Crosby, J.* The plaintiff appealed. *D. Stoneman*, for the plaintiff.

J. E. Hannigan, (*A. J. Santry* with him,) for the defendant.

LORING, J. The purpose of St. 1904, c. 320, is manifest. It was to relieve the courts of those counties in which defendants in actions of negligence usually have a place of business from the trial of actions where the act of negligence happened in another county to plaintiffs residing or having a place of business in other counties. If (as is contended by the plaintiff) it were still possible to begin the action (in such cases) by a trustee writ, the purpose of the enactment to a large extent would be nullified. We are of opinion that the Legislature meant what it said when it provided that such actions "shall be brought" in the county where the plaintiff lives or has his usual place of business, or in the county in which the injury was received, and that R. L. c. 189, §§ 1, 2, were to that extent impliedly repealed. See in this connection *Kilby Bank, petitioner*, 23 Pick. 93; *Merchants Bank v. Cook*, 4 Pick. 405.

The order for judgment dismissing the action must be affirmed; and it is

So ordered.

MYER SWARTZMAN & another vs. WILLIAM W. BABCOCK.

Suffolk. March 13, 1914. — June 17, 1914.

Present: RUGG, C. J., LORING, SHELDON, & CROSBY, JJ.

Contract, Consideration. Bills and Notes. Order.

A building contractor gave to a subcontractor who was doing the painting upon buildings being erected by him on different lots of land two orders upon the holder of construction mortgages upon the premises, each order being for money to be paid, in part out of the contractor's "completion payment" on the mortgage upon a building, and in part out of his "thirty-three day after completion payment," and the mortgagee accepted the orders, the payments to be made when the contractor should "earn" the respective payments. When one order was overdue, the subcontractor applied to the mortgagee for payment of a balance

due thereon, and the mortgagee told him that, if he would wait another week and in the meantime would complete the building referred to in the other order, "thereby completing his entire work," he "would receive his money." The subcontractor, relying on that promise, completed his work on the other building, and the mortgagee failed to pay. *Held*, that there was a sufficient consideration for the independent promise of the mortgagee, and that the subcontractor might maintain an action thereon.

If the holder of a construction mortgage upon buildings in process of erection, upon presentation to him of certain orders of the contractor erecting the buildings, directing that payments be made to a subcontractor from the contractor's "completion payment" and his "thirty-three day after completion payment," and the mortgagee accepts the orders by promising to make the payments when the contractor shall "earn" the respective payments, the mortgagee cannot set up, in defense to an action upon the order by the subcontractor, that the building was not fully completed, if the only reason that it was not fully completed was that the contractor and the mortgagee had agreed to dispense with the construction of a part of the building which was to have been constructed.

CONTRACT, with a declaration in two counts, the first count being upon orders of one Jacob Luff upon the defendant, hereinafter described, and the second count being upon an account annexed for \$375, "balance of amount due for material, and labor for painting." Writ in the Municipal Court of the City of Boston dated April 1, 1912.

On appeal to the Superior Court, the case was tried before *Aiken*, C. J. It appeared that the plaintiffs were partners. One of them testified that Jacob Luff, a builder, sought to make an agreement with them for the painting and paper-hanging of apartment houses in Belmont; that they would not enter into an agreement until they received security that they would be paid; that Luff took them to the defendant's office and two orders there were written and were accepted by the defendant. These were the orders which were declared on in the first count of the declaration. The first directed the defendant to pay to one of the plaintiffs \$200 "in the following order: One hundred fifty (\$150) dollars out of my completion payment on my mortgages on Lot 18 Hull Street, Belmont, Massachusetts, and the balance of fifty (\$50) dollars, out of the thirty-three (33) day after completion payment, on said mortgage, and charge the same to my account." The acceptance of the order by the defendant was in the following terms: "I accept the above order on the following conditions only: When Jacob Luff shall earn his completion pay-

ment on Lot 18 Hull Street, Waverley, mortgage, as per construction mortgage agreement I will pay M. Swartzman, the sum of One hundred fifty (\$150) dollars. And when said Luff shall earn his 33 day after completion payment on said Lot, as per said agreement, I will pay M. Swartzman the balance of Fifty (\$50) dollars."

The second order and its acceptance were in the same terms as the first, except that they referred to different houses and were for the sum of \$500, of which \$350 was to be paid from the "completion payment," and \$150 out of the "thirty-three day after completion payment."

Other material evidence is described in the opinion.

At the close of the evidence the defendant asked for the following rulings:

"1. On all the evidence, the plaintiffs, or either of them, are not entitled to recover against the defendant.

"2. On all the evidence, the defendant is entitled to a verdict against the plaintiff Levin.

"3. The plaintiffs, or either of them, are not entitled to recover because the orders sued on were accepted upon certain conditions, and there is no evidence that said conditions were fulfilled.

"4. The plaintiffs are not entitled to recover because the acceptances of the orders were conditioned upon the buildings being completed and there is no evidence that said buildings were completed.

"5. The plaintiffs, or either of them, are not entitled to recover because the acceptances relied upon of the orders in suit were conditioned upon Jacob Luff's earning the completion payments in accordance with the construction mortgage agreement, and there is no evidence that said Luff earned said payment under said agreement.

"6. The plaintiffs, or either of them, are not entitled to recover on the second count of their declaration because it appears that they made a contract with one Jacob Luff to do the work in question and there were no contractual relations between the plaintiffs, or either of them, and the defendant, except such as may arise out of the acceptance of the orders dated December 18th, 1911."

The rulings were refused. The jury found for the plaintiffs

in the sum of \$397.26; and the defendant alleged exceptions.

The case was submitted on briefs.

D. Stoneman & G. M. Nay, for the defendant.

S. L. Bailen & F. Leveroni, for the plaintiffs.

LORING, J. The plaintiffs in this case, who were painters, had undertaken to do the work of painting involved in the construction of certain houses which were being erected by one Jacob Luff. The defendant had agreed to advance money to Luff under a construction mortgage and had accepted orders from Luff for the payment of certain sums to the plaintiffs, payable at the completion payment and the thirty-third day after completion payment of some or all of the houses. It is stated in the report that "about a week before the twelfth of February, 1912, the plaintiffs called at the office of the defendant to receive the balance due them on the first order, which was then overdue, and that the defendant told them that if they would wait another week and would in the meantime complete the double house, so called, thereby completing their entire work, they would receive their money." Thereafter the plaintiffs, relying upon this promise, did complete their entire work and brought this action to recover from the defendant, first, on the ground that the money had become due under the defendant's acceptance of Luff's orders; and second, on the ground that there was an independent promise by the defendant to pay them the amount due for work in painting the houses in question.

There were six requests by the defendant for rulings which were, in effect, that the plaintiffs could not recover on either of the counts of his declaration. These requests were refused by the Chief Justice. The jury found a verdict for the plaintiffs and the case comes up on report. The only questions before us are those covered by the defendant's exceptions to the refusal of the presiding judge to give the rulings asked for.

We are of opinion that no error was committed by the Chief Justice in refusing to give these rulings.

So far as the second count is concerned, it is plain that although Luff had not been discharged from his contract the promise of the defendant to pay the plaintiffs for their work if they would complete it was a good independent promise, founded on a valid consideration within the doctrine of *Abbott v. Doane*, 163

Mass. 433, and *Paul v. Wilbur*, 189 Mass. 48. See also in this connection *Vanuzem v. Burr*, 151 Mass. 386. Indeed the defendant himself testified that after he foreclosed his mortgages upon the houses he had paid out substantially \$1,000 to complete them. If this testimony was believed it shows what was the situation under which he made his independent promise to the plaintiffs.

On the other hand there was evidence that all the work which Luff was to do on the premises was performed by Luff, except the construction of a granolithic walk, and one of the plaintiffs testified "that there was to be no granolithic walk by reason of a subsequent arrangement between Luff and the defendant."

We are of opinion that where an order is accepted to be paid when the contractor "shall earn his completion payment" on the building in question, the owner cannot set up in defense that the building was not fully completed if the only reason that the building was not fully completed was that he and the owner had agreed to dispense with the construction of a part of the building which was to have been constructed. The holder of the order in such a case is not in the position of the contractor. He does not have to show that the full contract price was earned. What he has to show is that the contractor earned his completion payment. When by reason of a subsequent agreement between the owner and the contractor the last payment is earned by a partial completion of the building to be constructed, the completion payment is earned within the meaning of this acceptance. Otherwise a subcontractor who had completed his work relying on the acceptance would be done out of his right to payment from the owner, not by fault of the contractor, but by the voluntary act of the owner.

It follows that judgment must be entered on the verdict; and it is

So ordered.

GARDEN CEMETERY CORPORATION vs. EDMUND K. BAKER.

Suffolk. March 16, 1914. — June 17, 1914.

Present: RUGG, C. J., LORING, SHELDON, & CROSBY, JJ.

Equity Jurisdiction, For alternative relief, To remove cloud on title, To redeem from tax sale, Laches. *Tax*, Assessment for street watering. *Cemetery. Equity Pleading and Practice*, Bill, Decree. *Words*, "Finding."

It is not a valid objection to a bill in equity that the plaintiff seeks to remove a cloud from the title to certain land created by what he alleges to have been a sale for the collection of a tax illegally assessed, and also, in case the sale should be declared to have been valid, seeks to redeem the land from the sale in accordance with St. 1909, c. 490, Part II, § 76.

A bill in equity, which was filed in June, 1911, by a private cemetery corporation to remove a cloud upon its title to the cemetery alleged to have been created by a sale in August, 1905, for the collection of a tax assessed illegally in 1902, and which contains appropriate allegations and prayers for redeeming the land from the tax if the sale shall be adjudged to have been valid, is brought within the six years allowed by R. L. c. 13, § 75, as amended by St. 1905, c. 325, § 3, and is not barred by laches although the purchaser at the sale paid taxes assessed to the plaintiff for the years 1904 and 1905, and taxes upon the premises were assessed to such purchaser in 1906 and 1907, and he paid them.

The exemption of cemeteries from general taxation by St. 1909, c. 490, Part I, § 5, cl. 8, does not exempt them from local assessments for special advantages arising out of public improvements.

A private cemetery corporation is subject to a tax assessed upon its cemetery under R. L. c. 26, §§ 26, 27, for street watering if the amount of the tax assessed upon the property is not in excess of the benefit conferred upon the property by the street watering.

It cannot be said as a matter of law that the real estate of a private cemetery corporation is not benefited by the watering of streets adjacent to the cemetery.

In a suit in equity involving the question, whether a tax for street watering assessed to a private cemetery corporation upon its cemetery is a legal assessment, where there is no question as to the propriety of the amount of the tax, the question, whether a benefit was conferred upon the cemetery by the street watering, is one of fact to be determined upon the evidence. In this case a finding, which was construed to be that no such benefit was conferred, was held not to have been clearly wrong.

In a report made by a judge of the Superior Court in a suit in equity brought by a private cemetery corporation for the removal of a cloud upon its title to its cemetery alleged to have been created by a sale for the collection of a tax for street watering purposes illegally assessed because the land had not been benefited by the watering of the streets, the judge, after a detailed statement of facts in a report, concluded as follows: "Upon the foregoing facts a decree is to be entered

in favor of the plaintiff for the cancellation of the said deed, upon the ground that the tax deed . . . was invalid. . . . If my order is correct, a decree is to be entered in accordance with the finding, with costs; otherwise such decree is to be entered as justice and equity may require." *Held*, that the word "finding" must be given its ordinary meaning of the ascertainment of a fact in a judicial proceeding; and that as a matter of interpretation the language quoted must be held to mean that the judge found as a fact, in view of all the circumstances, that no benefit was received by the land from the street watering.

In the foregoing case, the rescript directed that a decree be entered for the plaintiff, "unless within thirty days . . . on motion by the defendant to the judge who heard the case, further hearing is granted on the ground that the report previously made was not intended as a finding that as a fact the plaintiff's cemetery was not benefited by the street watering."

BILL IN EQUITY, filed in the Superior Court on June 16, 1911, praying that sales of the plaintiff's cemetery by the collector of taxes of the city of Chelsea for the payment of taxes assessed in 1902 and 1903 for street watering should be set aside as invalid, or that, if they should be adjudged to have been valid, the plaintiff should be permitted to redeem.

The suit was heard by *Jenney, J.*, who found the following among other facts: The plaintiff was incorporated under St. 1841, c. 114. The land owned and maintained by it as a cemetery in Chelsea is about three and one half acres. The city of Chelsea assessed a tax to the plaintiff as the owner of that property for street watering in the years 1902, 1903, 1904 and 1905. In August, 1905, the premises were sold by the collector of taxes to the defendant for non-payment of the taxes so assessed for 1902 and 1903. The defendant paid the taxes so assessed for 1904 and 1905. Such a tax was assessed to the defendant for the years 1906 and 1907, which he paid.

No question was made as to the formal regularity of the proceedings relative to the assessment or sale.

Previous to May 1, 1902, the premises had been divided into burial lots and single graves, with appropriate walks. There were no driveways. The entire area was divided into lots and graves, except the parts reserved and used for paths. All the burial lots had been sold. There were then over nine thousand bodies interred in the cemetery. Some single graves then remained unsold. They were scattered throughout the cemetery and did not form any parcel of substantial size. All single graves remaining on May 1, 1902, and all parts of lots repurchased since that time, had

been sold at the time of the hearing, and all single graves were in use for burial purposes. There were lots and portions of lots remaining in which there were no interments and which at some future time may be offered to the corporation by the owners, in case the owners thereof should desire to sell the same to the corporation, and the corporation should desire to purchase. Previous to May 1, 1902, it had been the practice of the trustees controlling the business of the corporation to buy back from owners parts of burial lots previously sold, where no interments had been made, and to divide such lots into single graves and sell them at a price in advance of that paid for the purchase of the lots. This practice was continued after May 1, 1902, and many graves were sold in this way after that date.

Money not used by the plaintiff for maintenance purposes had been invested, and the interest was used and was to be used only in paying the running expenses of the cemetery. Except from the sale of graves, there was no means of paying the expenses of care and maintenance of the grounds except from this fund. No dividends ever had been declared. Other than its invested funds the corporation had no income except such as it received in the sale of graves.

In 1902 there were about forty-five trees growing in the cemetery, and the greater part of it was grassed over. The corporation has taken care of so much of the cemetery as has not been sold, and also of some lots where there is an agreement as to perpetual care. It did not expend any money in preventing dust from coming into the cemetery from the street, and the watering of the street by the city was the only thing done to prevent such dust. There were streets on three sides of the cemetery. On two sides they were macadamized. In the street on the third side was a line of street cars with double tracks, and the street was paved between the tracks. On the fourth side of the cemetery were dwelling houses, the rear of the lots on which they were situated abutting on the cemetery. The opposite sides of the streets surrounding the cemetery were built up with houses in 1902, so that the cemetery constituted a space open to the air like a park, and people were allowed to go in and walk about.

Using the language quoted in the opinion, the judge reported the case for determination by this court.

W. A. Parker, for the plaintiff.

J. W. Allen, (*H. W. Packer* with him,) for the defendant.

RUGG, C. J. This is a bill in equity to remove a cloud on the title to land created by tax sales and deeds alleged to be invalid. Relief may be granted in appropriate cases for that cause under the general principles of equity. *Smith v. Smith*, 150 Mass. 73. The bill also contains apt allegations and prayers for redeeming from these sales under R. L. c. 13, § 75, as amended by St. 1905, c. 325, § 3 (now St. 1909, c. 490, Part II, § 76) provided the tax sales are held to be valid. *Barker v. Mackay*, 168 Mass. 76. No objection has been or rightly could be made to joining these two grounds for an equitable remedy in one suit and relying upon the one to which the plaintiff may be found to be entitled. The only question open in this proceeding is whether the assessment of the tax was legal. No inquiry can be made as to the propriety of its amount.

The plaintiff is not precluded by the lapse of time from maintaining this bill either under the statute or under general chancery jurisdiction. No one has been misled to his harm in any legal sense by the delay, and the situation has not materially changed. The suit was instituted within the time limited for redemption in the statute, provided equity requires that redemption should be allowed. The doubt whether a cemetery was liable to such assessments, and hence whether the sales to satisfy them were valid, was so well founded that the plaintiff ought not to be precluded from the right to redeem, even if its property be found to have been subject to the assessments.

The point at issue is whether land, devoted to the purposes of a burial ground and belonging to a private cemetery corporation organized under the general laws, is liable to an assessment for street watering made under R. L. c. 26, §§ 26, 27, as amended by St. 1909, c. 440, § 2. The constitutionality of this act is established so far as it applies to ordinary city or town estates. *Sears v. Boston*, 173 Mass. 71. *Corcoran v. Aldermen of Cambridge*, 199 Mass. 5.

No express exemption relieves the plaintiff. By R. L. c. 12, § 5, cl. 8, (now St. 1909, c. 490, Part I, § 5, cl. 8,) cemeteries are exempted from taxation so long as they are dedicated to the burial of the dead. But that exemption refers only to taxation

imposed for the general public purposes of the sovereign power and does not include exemption from local assessments for special advantages arising out of particular improvements of a public nature undertaken by government, such as the laying out of streets and sewers and like matters. *Boston Seamen's Friend Society v. Mayor & Aldermen of Boston*, 116 Mass. 181. *Worcester Agricultural Society v. Mayor & Aldermen of Worcester*, 116 Mass. 189. *Boston Asylum & Farm School for Indigent Boys v. Street Commissioners*, 180 Mass. 485. Street watering belongs to this class of special assessments. *Phillips Academy v. Andover*, 175 Mass. 118.

The plaintiff contends that it is exempt from the operation of the act because it says that as matter of law a cemetery can receive no benefit from the watering of adjacent streets, and because under a betterment statute like this no assessment can be levied in excess of the benefit actually conferred, and that, as there can be no benefit, there can be no assessment. It rests this contention upon the ground that the private benefit conferred by such a public service as street watering must be of a character to enhance the rental or sale value of the real estate, or to confer some actual or potential pecuniary advantage upon the owner, and that cemetery property, having no market value, cannot in the nature of things receive benefits of that sort. But this position is not tenable. The plaintiff has not obligated itself to perform public duties. It is not by law required to maintain a cemetery for any particular portion of the public other than those to whom it may sell lots. Its power is unrestricted to limit its lot owners by by-law or otherwise. *Milford v. County Commissioners*, 213 Mass. 162. As was said in *Donnelly v. Boston Catholic Cemetery Association*, 146 Mass. 163, at page 166: "It would be acting strictly within its powers if it sold all its lands for full price." It may sell or mortgage its real estate without special legislative authority, such authority being conferred by general law. R. L. c. 78 § 2; c. 109, § 6. See *Sweetser v. Manning*, 200 Mass. 378. In this respect it differs from public service corporations. *Attorney General v. Haverhill Gas Light Co.* 215 Mass. 394. The plaintiff is not exempt from such assessment as a public corporation. See *Boston v. Boston & Albany Railroad*, 170 Mass. 95. The plaintiff belongs to the class of private cemetery corporations which, although clothed with certain important privileges, belong

nevertheless to their legal and beneficial owners, who are at liberty to appropriate or sell them for general purposes.

It is conceivable that cemetery property may receive a direct and peculiar benefit from the watering of adjacent streets. The freedom from clouds of offensive dust enjoyed by those who have occasion to visit it, the refreshment of its vegetation and the general cleanliness of its trees, monuments and cenotaphs, allaying the heat of the atmosphere and rendering it fresher and more wholesome to those having occasion to visit it, all are elements of direct and special benefit. These advantages, if found to flow from street watering, well might render the cemetery more attractive and enable the plaintiff to sell its remaining lots more readily or at a higher price, or to charge more for annual care of lots already sold, than would be possible without them.

The facts presented are or may be found to be quite different from those disclosed in *Mount Auburn Cemetery v. Mayor & Aldermen of Cambridge*, 150 Mass. 12, where the land by legislative act was dedicated perpetually to the uses of a burial ground, its conveyance or use for any other purpose forbidden and its income from sales of lots required to be devoted to its improvement, and all private profit prohibited. Yet there the question was left open whether, if a public sewer were needed and used for the benefit of the land as a place for burial, an assessment therefor might not be levied, even though it was held that Mount Auburn, by reason of special legislative acts, could not be subjected to a general assessment for a sewer which it did not use. The plaintiff is a corporation with quite different powers than those conferred upon the corporation there before the court.

But while it could not have been ruled as matter of law that the plaintiff could not be liable to a street watering assessment, it cannot be said as matter of law to be so liable. Whether its cemetery property is so subject or not depends upon the question whether in truth it does receive thereby a special benefit for the use to which it is devoted. It is plain that the ordinary dwelling or business establishment would be benefited by street watering. It is not equally plain that a cemetery would receive a legal benefit. Whether it would or not depends upon an ascertainment of the fact after a weighing of the factors which have been enumerated and all others which may be material. The physical fea-

tures of the land, the extent and nature of its adornment, its trees and flowers, the number and tastes of its visitors, together with other pertinent circumstances, all are proper for consideration in determining whether the valuable use of the cemetery may be enhanced by the watering of the streets upon which it abuts. Whether the plaintiff's cemetery was benefited in this sense is a fact to be determined upon evidence, and a finding upon this point should be made by the trial court. This conclusion follows from the statement of the controlling constitutional principles in *Sears v. Aldermen of Boston*, 173 Mass. 71, and *White v. Gove*, 183 Mass. 333, 336, 337.

The conclusion that a cemetery may be liable to a special assessment of this general nature is supported by the great weight of authority. *Lima v. Cemetery Association*, 42 Ohio St. 128. *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506. *Gouverneur Village v. Gouverneur Cemetery Association*, 136 App. Div. (N. Y.) 37. *Mullins v. Mount Saint Mary's Cemetery Association*, 239 Mo. 681. *Philadelphia v. Union Burial Ground Society*, 178 Penn. St. 533. *Baltimore v. Green Mount Cemetery*, 7 Md. 517. *Bloomington Cemetery Association v. People*, 139 Ill. 16. *Seattle v. Mount Pleasant Cemetery Co.* 59 Wash. 41. See cases collected in 22 Ann. Cas. 1047, *et seq.* See *Meriden v. West Meriden Cemetery Association*, 83 Conn. 204. There are contrary authorities, resting generally, however, upon the interpretation of exemption statutes and not upon abstract principles. *Cave Hill Cemetery Co. v. Gosnell*, 156 Ky. 599. *Swan Point Cemetery v. Tripp*, 14 R. I. 199. *In re New York*, 192 N. Y. 459.

The statement of the terms of the report is this: "Upon the foregoing facts a decree is to be entered in favor of the plaintiff for the cancellation of the said deed, upon the ground that the tax deed hereinbefore referred to was invalid. . . . If my order is correct, a decree is to be entered in accordance with this finding, with costs; otherwise such decree is to be entered as justice and equity may require." It is not entirely clear whether this is a finding of fact or a ruling of law. If it was intended as a finding of fact, it cannot be pronounced plainly wrong, and under the familiar rule must stand. As matter of interpretation we are of opinion that the absence of any express reference to a ruling made which by implication would mean a conclusion based upon

a decision of the law, and the statement that his "order" (which was an order for a decree) was "in accordance with this finding," indicates that the judge found as a fact, in view of all the circumstances, that there was no benefit received. "Finding" is a word which imports the ascertainment of a fact in a judicial proceeding, and commonly is applied to the result reached by a judge. Sometimes, however, as matter of interpretation it has been treated as a ruling of law. *Clapp v. Wilder*, 176 Mass. 332, 337. The parties in the case at bar have argued as if it were a ruling of law. As these questions of law were involved upon any aspect of the case, they have been determined. But, in view of the phrase of the report and its form, with a full narration of the facts, we treat it as a finding of fact that there was no benefit to the plaintiff's land by reason of the watering.

A decree, therefore, is to be entered in favor of the plaintiff for the cancellation of the deeds, on the ground that they were invalid, unless within thirty days from the entry of rescript on motion by the defendant to the judge who heard the case further hearing is granted on the facts, on the ground that the present report was not intended as a finding that as a fact the plaintiff's cemetery was not benefited by the street watering.

So ordered.

HAZEL YOUNG vs. JEFFERSON E. DUNCAN & trustees.
HAZEL YOUNG'S CASE.

Middlesex. Suffolk. March 17, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Practice, Civil, Abatement, Trial by jury, Exceptions. *Workmen's Compensation Act. Constitutional Law.*

Where in an action of tort, in which the plaintiff has claimed a trial by jury, the defendant files a plea in abatement, and the plaintiff proceeds to take part in a hearing before the presiding judge upon the plea in abatement without objection and without insisting upon a trial by jury as to the questions of fact raised by the plea, and the judge finds the facts to be as there alleged and sustains the plea as a bar to the action, the plaintiff has waived his right to have those facts passed upon by a jury, and no question in regard to his constitutional right to a trial by jury is involved.

By St. 1911, c. 751, Part I, § 5, an employee of a subscriber under the workmen's compensation act waives his right of action at common law to recover damages for personal injuries, unless he gives his employer at the time of his contract of hire notice in writing that he claims such right; and, if the employer was at the time of the employment a subscriber, the waiver is not affected by ignorance of this fact on the part of the employee, and it is immaterial whether or not the employer gave to the employee the notice required by St. 1911, c. 751, Part IV, § 21, as amended by St. 1912, c. 571, § 16, that he has provided for the payment of compensation to injured employees under the act, the giving of such a notice being required for other purposes and having no connection with an employee's waiver of his right to sue his employer at common law.

If evidence, which was excluded by the presiding judge at a trial for a wrong reason, was irrelevant and ought to have been excluded, an exception to its exclusion will be overruled.

Where the justices of this court have given their opinions, under c. 3, art. 2, of the Constitution, that a certain statute, if enacted, would be constitutional, and the statute itself afterwards comes before the court in a judicial controversy in which the question of its constitutionality is raised and is argued by counsel, the question is treated as an open one, the previous expression of the opinions of the justices not being an adjudication to which the rule of *stare decisis* applies.

The provision of the workmen's compensation act contained in St. 1911, c. 751, Part I, § 5, that an employee of a subscriber under that act "shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed such right," as interpreted by this court to be an absolute and unconditional provision not dependent upon knowledge by the employee or upon notice to him that the employer was a subscriber at the time of the contract of hire, is constitutional.

Where an injured workman, who is employed by a subscriber under the workmen's compensation act and has waived his right of action at common law, makes no claim under the act, but brings instead an action at common law against his employer, the insurer under St. 1911, c. 751, Part III, § 5, as amended by St. 1912, c. 571, § 10, may notify the Industrial Accident Board, who thereupon must call for the formation of a committee of arbitration, this being a case where the insurer and the injured employee have failed to reach an agreement in regard to compensation under the act.

Where under the workmen's compensation act a committee of arbitration was formed and made an award in favor of an injured employee, and a claim for review by the Industrial Accident Board was filed by the employee but afterwards was withdrawn by him before any hearing, and, upon motion of the insurer, a decree has been made by the Superior Court for the payment of compensation in accordance with the report of the committee of arbitration, under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, the employee has no right of appeal from such decree.

RUGG, C. J. Hazel Young received injuries on June 10, 1913, arising out of and in the course of her employment while working for Jefferson E. Duncan at his jewelry factory at Arlington.

She brought an action of tort at common law against her employer, alleging that her injuries resulted from his negligent conduct. The defendant seasonably filed a paper entitled "Motion and Plea," setting out that he was a subscriber under the workmen's compensation act at the time of the plaintiff's employment by him and had continued so to be since, and that she neither at the time of entering his employment nor at any time thereafter gave him notice that she claimed her right of action at common law as provided in St. 1911, c. 751, Part I, § 5, and hence that she could not maintain her action at law, concluding with a prayer that the writ abate. Both parties treated this as a plea in abatement. The plaintiff had claimed a trial by jury. It is not necessary to determine whether this referred only to the general issues raised in her declaration or extended to the plea in abatement. She had a right to claim a trial by jury upon the facts raised by this plea. *O'Loughlin v. Bird*, 128 Mass. 600. *Oliver Ditson Co. v. Testa*, 216 Mass. 123. But, having proceeded to hearing upon the plea before the judge, without objection and without insisting upon a trial by jury as to the facts raised by it, that right, if preserved up to that time, was waived as to that point. Hence, no constitutional right to trial by jury is involved in this respect. The judge * allowed the motion. As a matter of construction this means that he found the facts as alleged in the motion. He excluded, subject to the plaintiff's exception, the affidavit offered by her tending to show that the defendant had not complied with Part IV, § 21, of the act, as amended by St. 1912, c. 571, § 16, as to an employer giving notice to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees under the act, that no notice had been given her and that she had no knowledge that the defendant was a subscriber under the act.

It must be presumed that the judge found that the defendant was a subscriber under the act. That finding must stand, as the evidence upon which it was based is not reported. The questions presented are, whether an employee must receive notice that the employer is a subscriber before he can be held to have waived his common law rights, and whether the failure of the

* *Crosby, J.*

employer to give the notices required of him renders the act inoperative as to the unnotified employee, if the latter so elects.

The purpose of this act has been stated several times. Briefly, it was to substitute a method of accident insurance in place of the common law rights and liabilities for substantially all employees except domestic servants, farm laborers and masters of and seamen on vessels engaged in interstate or foreign commerce, and those whose employment is casual or not in the usual course of trade, business or employment of the employer, and probably those subject to the federal employers' liability act. It was a humanitarian measure enacted in response to a strong public sentiment that the remedies afforded by actions of tort at common law and under the employers' liability act had failed to accomplish that measure of protection against injuries and of relief in case of accident which it was believed should be afforded to the workman. It was not made compulsory in its application, but inducements were held out to facilitate its voluntary acceptance by both employers and employees. It is manifest from the tenor of the whole act that its general adoption and use throughout the Commonwealth by all who may embrace its privileges is the legislative desire and aim in enacting it. The act is to be interpreted in the light of its purpose and, so far as reasonably may be, to promote the accomplishment of its beneficent design.

Part I, § 5, provides that "An employee of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed such right, or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within thirty days of notice of such subscription." This sentence is plain and definite. The employee is held to have waived his common law right if he fails to give notice "at the time of his contract of hire." This absolute and unequivocal provision is not made dependent upon any other condition or circumstance. It is not made to rest upon knowledge or notice to him of the fact that the employer is a subscriber. That it was not intended to be dependent upon such knowledge or notice is plain from the concluding clause which, in the event of the employer becoming a subscriber after the employment,

makes such waiver dependent upon notice. The expression of this condition in the one class of cases impliedly would exclude it from the other, even if the language used were less plain. It seems clear beyond a doubt from these words that the notice is required to be given at the time when the terms of the employment are fixed by the contract of hire.

It is urged, however, that the effect of this unequivocal language is modified by Part IV, § 21, as amended by St. 1912, c. 571, § 16, which requires every subscriber to "give notice in writing or print to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the association" and to file a copy of the notice with the industrial accident board. This is a direction to the employer, but failure to comply with it does not carry with it any penalty either to him or to the employees, except that it may involve some consequences to the employer as shown by § 22. That it was not intended to be of rigid effect is apparent from the further provision that the notice may be given as there prescribed "or in such other manner as may be approved by the Industrial Accident Board." Manifestly the rights of employees were not intended to be made to rest on a method of giving notice which may be changed from time to time by an administrative board as experience may evolve that which is most practicable. Moreover, this notice may have other uses in giving information as to hospitals and physicians available to employees in case of injury, as is pointed out in *Panasuk's Case*, 217 Mass. 589. If the employee's right to avail himself of the act depended upon actual notice to him of the fact of insurance by the employer, hardship to the employee often might result. There would be strong ground for the argument (if the plaintiff's contention were upheld) that the only right of an employee would be at common law unless the employer gave the required notice — a consequence manifestly at variance with the general purpose of the act and one which in many instances would work great hardship. There is no indication in the act itself that Part I, § 5, and Part IV, § 22, were intended to be correlative or interdependent. Each stands alone with distinct uses and purposes. As thus interpreted the act is plain and easy of comprehension. If an employee desires to avoid the act and preserve his common law rights,

he must give notice to that effect in the absence of fraud when he enters the employment rather than when he is notified of insurance by the employer, or he is held to have availed himself of the act. This construction in the vast majority of cases will forward the beneficent aims of the act better than any other. The evidence offered by the plaintiff was excluded rightly.

This was not the reason for the ruling given in the Superior Court. But the accuracy of the reason given is of no consequence when the ruling is right. *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 384.

It follows that the plaintiff had no occasion for a trial of the question whether the employer had given the notice required of him under the act or the regulations of the Industrial Accident Board, and hence had no right to a trial by jury in that respect. If the parties are subject to the act, then all their rights arising under it are to be settled by the agencies there provided and not as in actions at common law. *Panasuk's Case*, 217 Mass. 589.

The plaintiff argues that the act is unconstitutional as thus interpreted. An opinion was given by the justices to the General Court to the effect that the act would be constitutional if enacted. *Opinion of the Justices*, 209 Mass. 607. This opinion, however, was advisory in character, given by the justices as individuals, without the benefit of argument, and was not an adjudication by the court, and the rule of *stare decisis* does not apply to it. *Green v. Commonwealth*, 12 Allen, 155, 164. *Opinions of the Justices*, 7 Pick. note at pages 125-130; 126 Mass. 557, 566; 214 Mass. 599; 602, 604. Therefore, the ground is re-examined in the light of the argument now presented, without reliance upon the earlier opinion of the justices and with the effort carefully to guard against any influence flowing from our previous consideration.

Attack is made upon Part I, § 5, on various grounds. It is urged that it deprives the plaintiff of her constitutional right to a trial by jury. If that question properly is presented and insisted upon, undoubtedly an employee has a right to a trial by jury on the point whether the employer was in truth a subscriber under the act and whether notice had been given by the employee at the time of the contract of hire of an election to rely upon his common law rights in cases where claim is asserted that such notice had been given. The issue of fact whether the parties have

come under the operation of the act may be tried to a jury. It is analogous to the issue whether an agreement to arbitrate has been made. *Boyd v. Lamb*, 152 Mass. 416. It may be assumed that a right of action for personal injuries at common law is a property right. But the right of trial by jury respecting it goes no farther in a case like the present than the right to have the question whether she had retained such a common law right under the act determined by a jury. But, as has been pointed out, so far as that right existed in the case at bar, it was waived.

The section in question affects no existing property right. It deals with no property right after it has come into being. It affects a situation which antedates any property right arising out of tort. It simply establishes a status between subscribers under the act and their employees in the absence of express action by the latter manifesting a desire to elect a different status. No complaint justly can be made that the section compels the employee to elect without sufficient knowledge. Ignorance of the law commonly is no excuse for conduct or failure to act. The employee is not required to act without inquiry as to the fact of insurance by the employer. He has only to ask for information. That is nothing more than is required in most of the affairs of life in order that one may act intelligently. Knowledge as to interstate commerce rates may be inaccessible without very considerable inquiry, and yet shippers or passengers may be bound by them although ignorant of their terms. *New York, New Haven, & Hartford Railroad v. York & Whitney Co.* 215 Mass. 36, 39. *Texas & Pacific Railway v. Cisco Oil Mill*, 204 U. S. 449. *Kansas City Southern Railway v. C. H. Albers Commission Co.* 223 U. S. 573, 594. *Boston & Maine Railroad v. Hooker*, 233 U. S. 97.

The requirement that the election be made at the time of the contract for hire is reasonable. Difficulties of a serious nature would be presented if the right of election were allowed to be exercised after the happening of the accident.

The possibility that the employee in a given instance may not know all his rights does not affect the constitutional aspects of the law. Many crimes even are made to depend solely upon the doing of an act with the utmost moral innocence and in ignorance of any forbidding aspect of the act. *Commonwealth v. Mixer*, 207 Mass. 141.

The employee is not compelled to give up any common law or constitutional right. It is a matter of choice whether he avails himself of the one or the other. Reasonable provisions are made for the exercise of his election. *Foster v. Morse*, 132 Mass. 354.

The section is not open to objection as class legislation, or as denying equal protection of the laws. It applies to all employees alike. In this respect it is no more vulnerable than the employers' liability act, which establishes remedies for the benefit of employees, the weekly payment law or many other acts of like nature. *Opinion of the Justices*, 163 Mass. 589. *Commonwealth v. Riley*, 210 Mass. 387. *Sturges & Burn Manuf. Co. v. Beauchamp*, 231 U. S. 320, 326, and cases cited. *Chicago, Burlington & Quincy Railroad v. McGuire*, 219 U. S. 549. *Mondou v. New York, New Haven, & Hartford Railroad*, 223 U. S. 1. *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389. *Erie Railroad v. Williams*, 233 U. S. 685. The act is constitutional and is not open to criticism in the respects urged by the plaintiff. It follows that judgment rightly was ordered for the defendant in the action at law.

Hazel Young received her injury on June 10, 1913. She made no claim under the workmen's compensation act. But the insurer of her employer, acting under Part III, § 5, as amended by St. 1912, c. 571, § 10, which permits either party to act in case the insurer and the injured employee fail to agree as to the latter's compensation, notified the Industrial Accident Board of the accident, and a commission on arbitration was formed which made an award in favor of the employee. This course was warranted under the circumstances. *Burt v. Brigham*, 117 Mass. 307. A claim for review by the Industrial Accident Board was filed by the employee, but later withdrawn before any hearing. Hence by Part III, § 7, as amended by St. 1912, c. 571, § 12, the decision of the arbitration committee stood and became enforceable in the Superior Court. The insurer as permitted by the act took proper proceedings in that court, and a decree correct in form was entered for the payment of compensation in accordance with the report of the arbitration committee. The employee attempted to appeal from this decree. But it is plain from Part III, § 11, as amended by St. 1912, c. 571, § 14, that no appeal lies under these circumstances from the decree of the Superior Court. That section provides that when a decree of the Superior Court has been entered

"there shall be no appeal therefrom . . . where the decree is based upon a decision of an arbitration committee."

This is a provision obviously intended for the benefit of the employee to prevent any delay in receipt by him of the compensation. The machinery of the act is first a decision by the arbitration committee. If there is any dissatisfaction with this, the next step is a review by the Industrial Accident Board. If no such review is insisted upon, then there can be no further controversy on the facts, and the Superior Court, unless there is legal reason to the contrary, must enforce the award so made. The express provision of the act is that there shall be no appeal. In cases of errors of law apparent on the face of the record, they may be corrected by certiorari, or perhaps by some other appropriate remedy. *Young v. Blaisdell*, 138 Mass. 344. *Kiely v. Corbett*, 205 Mass. 158. Plainly in the case at bar there is no irregularity or want of jurisdiction, and the proceedings are not open to objection.

As there was no ground for appeal from the decree of the Superior Court, that appeal must be dismissed.

Exceptions overruled. Appeal dismissed.

O. C. Scales, for Hazel Young as the plaintiff in the first case and the employee in the second case.

E. C. Stone, for the defendant in the first case and for the insurer in the second case.

HANNAH BUCKLEY'S (dependent's) CASE.

Suffolk. March 19, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Workmen's Compensation Act.

Although under the workmen's compensation act there can be no appeal from a finding of the Industrial Accident Board if there was any evidence to support it, yet, where all the evidence is reported, the question of law whether the evidence was sufficient to warrant the finding may be presented for decision by this court. Upon the question of law, whether a finding made under the workmen's compensation act by the Industrial Accident Board, that a sister of a deceased employee was wholly dependent upon such employee for support, was warranted by the

evidence, all of which was reported, where the only doubt whether the finding was warranted was created by certain vague and unsatisfactory evidence in regard to the interest of the alleged dependent sister in a house in which these two sisters and a third sister lived together, from which the Industrial Accident Board well might have concluded that the interest of the alleged dependent sister in the house, even if it was a life estate, was of little if any value for use or sale and for that reason had practically no bearing on the question of her dependency, it was *held*, that it could not be said as matter of law that such a conclusion was erroneous.

HAMMOND, J. This is an appeal by the insurer from a decree of the Superior Court made in accordance with a decision of the Industrial Accident Board acting under St. 1911, c. 751, commonly called the workmen's compensation act. The only question raised here by the appellant is whether the evidence justified the finding of the board that Margaret Buckley, at the time of the injury to her sister, Hannah, the deceased employee, was wholly dependent upon her for support.

There is no appeal from the finding of the board upon a question of fact where there is any evidence to support it; but where, as here, the evidence is all reported, the question whether it is sufficient to warrant the finding is one of law and may be revised here.

The insurer contends that the finding that Margaret was wholly dependent upon Hannah is not justified by the evidence. We have examined the evidence and cannot say as matter of law that it does not justify the finding. The only part of it that presents any difficulty is that part relating to Margaret's interest in the house in which she and her sisters lived. Curiously enough, while the evidence as to the other circumstances of the family is stated with considerable detail in the body of the majority report of the committee on arbitration, upon which that report as well as the decision of the board is based, the matter of the ownership of the house is not mentioned either by the committee or by the board. It appears only in the transcript of the evidence made for the insurer by the committee, of which transcript the board say that it "adds unnecessarily to the record, the material evidence being stated in the report of the committee . . . and the findings and decision of the . . . board."

It appears from this transcript that Margaret testified that the house "is owned by them [Margaret and Hannah]; that when the mother died, the house was passed down to her [Margaret], and

at her death it was to go to Hannah, and at Hannah's death it was to go to Hannah's dependents; that the house is worth about \$2,000, including the land and barn." Helen, a sister, testified that "the furniture had always been in the house, but she thought that perhaps when the house was left to Margaret, . . . the furniture was also left; that many new things had been added to the house since her mother died."

This evidence was very vague and unsatisfactory. No documentary evidence was given so that it could be determined what was the precise nature of Margaret's interest; and, in view of her long continued illness and invalidism, it may be that no reliance was placed either by the committee or by the board upon her testimony in this respect. Moreover, her statement, if believed, showed at most only a life interest, and no light was thrown upon the condition of the property and the cost of keeping it up as a life tenant was bound to do. And further, it may have seemed to the board upon the evidence that Margaret was frail and liable at any time to die suddenly. It does not appear whether there was a mortgage upon the house. Indeed the whole evidence upon the subject seems, as above stated, to have been very unsatisfactory, and the board well may have concluded that Margaret's interest, even if it was a life estate, was of little if any value for use or for sale, and for that reason practically had no bearing upon the question of her dependency upon Hannah. It cannot be said as matter of law that such a conclusion was erroneous.

Decree affirmed.

The case was submitted on briefs.

E. C. Stone, for the insurer.

D. D. Sullivan, J. V. Sullivan & John Wentworth, for the dependent.

BARNET GOLDENBERG & another vs. ANIELLO A. TAGLINO.

Suffolk. March 19, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Equity Pleading and Practice, Master's report. *Contract*, In writing.

In a suit in equity, where a master's report does not state the evidence, the findings of the master cannot be reversed unless wrong as matter of law, and in the present case a finding by a master, that the state of an account between the parties had not been changed by an announcement made by the plaintiff to the defendant that he intended to charge off a counter claim of the defendant against his own claim, was held to disclose no error of law.

Where the parties to a contract without fraud or mistake have reduced it to writing in language that is not obscure, it is held to express the final conclusion reached, and all previous and contemporaneous oral discussion and written memoranda are assumed to have been rejected or to have been merged in it. Thus in a contract in writing, by which G purchased from T the controlling interest in a certain corporation, the stipulation, "G agrees that so long as he and T are stockholders in said corporation T shall continue in the employ of the corporation," cannot be varied or amplified by oral evidence in regard to matters which were agreed upon in the negotiations that resulted in the contract.

RUGG, C. J. This is a bill in equity for the specific performance of a contract to which the parties were the plaintiff Goldenberg, the plaintiff corporation, the defendant, a brother of the defendant and another person named Frangipane. The plaintiffs' exceptions to the master's report were sustained and those of the defendant overruled, and, after a decree for the plaintiffs,* the case is brought here by the defendant's appeal.

The contract, out of which the suit grows, related primarily to the purchase by the plaintiff Goldenberg from the defendant of the controlling interest in the plaintiff corporation, with many ancillary clauses. By one of these the defendant guaranteed all outstanding accounts then due to the corporation, and agreed that it should have a lien on his stock and on any sums due him from it to secure the performance of his guaranty. The master found that there was due on this account from the defendant an

* Made by *Pierce, J.* The master was Burton Payne Gray, Esquire.

amount in excess of \$3,000 with interest at six per cent from the filing of the bill. He further found that on August 9, 1911, the plaintiff corporation owed the defendant \$2,250.57, which by agreement was to bear interest at four per cent, and that two days before this suit was brought the plaintiffs notified the defendant that it had decided to charge off this loan against an equivalent amount due on the guaranteed accounts, but that this never had been done. The plaintiffs alleged in their bill that this amount had been so charged off as was permitted by the contract, and that the plaintiff corporation had notified the defendant that it had decided so to charge it off. Standing alone this would have bound the plaintiffs, and (if admitted by the defendant) they would not have been allowed to take a position in conflict with the case as stated in their bill. But the defendant, although admitting that he received the notice, specifically denied the other allegations upon this point. It thus became an issue between the parties upon which the master was obliged to pass. The evidence is not reported, and the master's report cannot be overturned unless wrong as matter of law. Notice by the plaintiffs of a decision on their part to charge the indebtedness against the amount due on the guaranty was not equivalent to doing so. Until it actually was done the state of the account was not changed by the forming of a purpose to that end. No error is shown in this regard.

It was provided by clause 2 of the contract that fifty-four shares of stock in the corporation were transferred to the plaintiff Goldenberg, and one more to his nominee, by the defendant, "with the understanding and agreement of all parties hereto that the said shares are a controlling interest in said corporation and are to carry all the incidents of control, excepting in so far as hereinafter limited;" while by clause 16, "Goldenberg agrees that so long as he and A. A. Taglino are stockholders in said corporation A. A. Taglino shall continue in the employ of the corporation." Against the objection and subject to the exception of the plaintiffs, the master received evidence and made a finding thereon to the effect that in the course of the negotiations resulting in the contract the parties mutually agreed that the defendant should act as "inside salesman" and have general charge of the shipping department of the corporation, and that the salaries of Golden-

berg and the defendant should be the same so long as the latter continued in the employment, and that the plaintiff had violated the terms of this agreement. There was error in this respect, and the judge was right in sustaining the plaintiffs' exceptions. Where parties, without fraud or mistake, have reduced to writing a contract, it is presumed alone to express the final conclusion reached, and all previous and contemporaneous oral discussion, or written memoranda, are assumed to be either rejected or merged in it. *Perry v. J. L. Mott Iron Works Co.* 207 Mass. 501. *Jennings v. Puffer*, 203 Mass. 534. This is not simply a rule of evidence, but also one of substantive law, affecting the rights of the parties as secured through the written agreement. *Mears v. Smith*, 199 Mass. 319. *Butterick Publishing Co. v. Fisher*, 203 Mass. 122. When the written agreement in any respect is uncertain or equivocal in meaning, all the circumstances of the parties leading to its execution may be shown for the purpose of elucidating, but not of contradicting or modifying its terms.

In the case at bar the terms of the contract were not obscure. The transfer of the stock expressly is stated to carry with it all the incidents of majority ownership, except as modified by its other provisions. The agreement to employ the defendant so long as he and Goldenberg remain stockholders is explicit and is not open to misunderstanding. It means general employment at reasonable work in accordance with capacity for useful service for fair compensation. These two clauses of the agreement considered together are incompatible with the further idea of fixed continuance in a particular position involving something of executive responsibility at a compensation to correspond with that of someone else. They preserve to the defendant a permanence of opportunity to labor, as a stockholder and a former owner under such an agreement might reasonably expect, for a rational wage at a task commensurate with his ability, training and faithfulness, so far as may be afforded by the extent of the business and the dominant responsibility for the general success of the venture resting upon the owners of the majority of the stock. The particular agreement found by the master to rest upon this outside oral evidence was not in addition to the terms of the written contract as to a point where it was silent, but was contradictory to the implications arising from its express words. In this respect the case at bar

is similar to and governed by *Violette v. Rice*, 173 Mass. 82, *DeFriest v. Bradley*, 192 Mass. 346, *Strong v. Carver Cotton Gin Co.* 197 Mass. 53, *Mears v. Smith*, 199 Mass. 319, and is different from *Stoops v. Smith*, 100 Mass. 63, *Keller v. Webb*, 125 Mass. 88, *Smith v. Vose & Sons Piano Co.* 194 Mass. 193, and cases of that sort relied on by the defendant.

The pleadings do not deal with the subject of the defendant's wages. Although the findings of the master cover this point, the plaintiff's exception thereto was sustained and the final decree obviously omits any consideration of the matter. The defendant is ordered to pay simply the amount of accounts guaranteed by him and otherwise due from him, and is credited only with his loan to the corporation. If the defendant had desired to have this matter adjudicated, he should have brought it in issue in some way by proper amendments to the pleadings either in this suit or in his cross bill and by a motion to recommit the case to the master. At all events, it is not now before us.

Decree affirmed with costs.

E. A. Howes, Jr., for the defendant.

J. W. Fowler, for the plaintiffs.

TRAVELERS INSURANCE COMPANY *vs.* JAMES F. MAGUIRE & trustees.

VAUGHN CALLAHAN *vs.* ROBERT E. MAGUIRE & others.

Suffolk. March 20, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Trustee Process. Equity Jurisdiction. To reach and apply equitable assets.
Partition. Funds in hands of commissioner.

The interest of one of the tenants in common of certain real estate, which was sold by a commissioner appointed by the Probate Court under R. L. c. 184, §§ 31, 47, to make partition of it, in the proceeds from the sale of such real estate in the hands of the commissioner is not subject to attachment by trustee process under R. L. c. 189, § 31, cl. 3, which provides that "no person shall be adjudged a trustee . . . by reason of having money in his hands as a public officer, for which he is accountable to the defendant merely as such officer."

An interest in a fund, derived from a sale of real estate upon a petition for partition, which is in the hands of a commissioner appointed in such proceedings, cannot be reached and applied by a suit in equity under R. L. c. 159, § 3, cl. 7, to the payment of a debt due from one of the tenants in common of the real estate so sold, as that statute does not extend to a fund in the custody of the law.

RUGG, C. J. The defendant Maguire was a tenant in common with others of certain real estate. Upon a petition for partition a commissioner to make partition by sale was appointed by the Probate Court of Suffolk County, who, in accordance with the terms of the warrant, made a sale of the real estate and received a sum in excess of \$10,000, for which he is accountable as such commissioner. The court has not yet confirmed the sale, nor made allowance for expenses and services of the commissioner.

The Travelers Insurance Company attached by trustee process in an action against Maguire the share to which he may be entitled in the hands of the commissioner. The only question presented in this action is whether such funds thus can be attached.

This money is not subject to attachment by trustee process. Under St. 1794, c. 65, relating to trustee process, it was held that executors and administrators could not be summoned as trustees, *Barnes v. Treat*, 7 Mass. 271, and *Brooks v. Cook*, 8 Mass. 246, although not expressly exempted therefrom, on the ground that legacies and distributive shares were not goods, effects or credits of the debtor deposited with or entrusted to the executor or administrator, but rather were funds in his hand by operation of the law itself and not by virtue of any contract or other voluntary relation established by act of the parties. The same rule had been held applicable to sheriffs. *Wilder v. Bailey*, 3 Mass. 289. *Chealy v. Brewer*, 7 Mass. 259. It is stated in the report of the commissioners appointed to revise the general statutes of the Commonwealth, that it was intended to express by Rev. Sts. c. 109, § 30, cl. 3, (now R. L. c. 189, § 31, cl. 3,) the law as it had been declared in these several decisions, except that by § 62 (R. L. c. 189, § 20) executors and administrators expressly were made subject to trustee process. The same principle later has been held applicable to a guardian, *Gassett v. Grout*, 4 Met. 486, an assignee in insolvency, *Colby v. Coates*, 6 Cush. 558, *Dewing v. Wentworth*, 11 Cush. 499, a constable, *Robinson v. Howard*, 7 Cush. 257, a police officer, *Morris v. Penniman*, 14

Gray, 220, a trial justice, *Burnham v. Beal*, 14 Allen, 217, a town owing statutory compensation to a public officer, *Walker v. Cook*, 129 Mass. 577, a receiver, *Columbian Book Co. v. De Golyer*, 115 Mass. 67, a trust company holding on deposit under order of the Probate Court a distributive share due an heir, *Chase v. Thompson*, 153 Mass. 14, and an assignee in insolvency holding money due a mortgagee by reason of having sold under order of court the property to which the mortgage lien attached, *Thayer v. Tyler*, 5 Allen, 94. In the latter case it was said, "that no person, deriving his authority from the law, and obliged to execute it according to the rules of law, can be held by the trustee process, except so far as he is expressly made liable by statute."

This statement of the principle amply covers the case at bar. The commissioner derives all his powers from the statutes which authorize the appointment of such officers by the Probate Court, prescribe their functions and require the execution thereof to conform exactly to their terms and to be approved by the court. No statute has made such an officer subject to trustee process. It follows that the order discharging the trustee was right and according to the terms of the report it is

Affirmed.

Vaughn Callahan brought a bill in equity under R. L. c. 159, § 3, cl. 7, seeking to reach and apply in satisfaction of a debt due him from Maguire the latter's share in the proceeds of the sale in the hands of the commissioner. The remedy provided by this statute often has been referred to as an equitable trustee process. It is a relief resting wholly upon the statute and not belonging to any branch of general chancery jurisprudence. *Stockbridge v. Mixer*, 215 Mass. 415. *Pettibone v. Toledo, Cincinnati, & St. Louis Railroad*, 148 Mass. 411. The relief afforded of reaching property not otherwise accessible by legal process is the single feature which renders proper its statutory classification under equity jurisdiction. In its essential nature the remedy thus afforded is the same as that given by the trustee process in an action at law. The same general principles have been applied in determining whether the equitable process lies as in deciding whether attachment could be made by trustee process in an action at law. This is illustrated by *Tuck v. Manning*, 150 Mass. 211, where *Wilder v. Bailey*, 3 Mass. 289, and like cases were relied on in

reaching the conclusion that resort could not be had to the equitable remedy to reach and apply money in the hands of a clerk of court due to the principal defendant. In *Commonwealth v. Hide & Leather Ins. Co.* 119 Mass. 155, it was said by Gray, C. J., that this statute "does not extend to property which is not in the control of the debtor, nor put by him into the custody of a third person, but which is in the hands of officers of the law for distribution under proceedings provided by statute for that purpose." That decision was adopted and followed in *Tuck v. Manning*, 150 Mass. 211, and *Williston Seminary v. Easthampton Spinning Co.* 186 Mass. 484, and was recognized in *Adamian v. Hassanoff*, 189 Mass. 194, although there a different principle was followed. It was the ground of decision in the recent case of *Berlin Mills Co. v. Lowe*, 211 Mass. 28. It is decisive against the plaintiff in the case at bar. The theory upon which these cases proceed is that the law having taken the custody of the fund, its final disposition and distribution may not be obstructed by suits of creditors of one or more of those having an interest in the fund.

Decree dissolving injunction affirmed.

W. H. Hitchcock, for the plaintiff the Travelers Insurance Company.

A. K. Cohen, (*H. A. Mintz* with him,) for the plaintiff Callahan.

C. F. Eldredge, (*H. Caverly* with him,) for the trustee in bankruptcy of James F. Maguire.

FRANK EDWARDS vs. FRANCIS WILLEY & others.

Suffolk. March 24, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Practice, Civil, New Trial, Setting aside verdict, Verdict. *Damages*, Excessive.

The provision of St. 1911, c. 501, that whenever a verdict is set aside and a new trial is granted, the judge "granting the motion for the new trial shall file a statement setting forth fully the grounds upon which the motion is granted," does not take away nor in any way diminish the discretionary power of a presiding judge to set aside a verdict on a motion in writing of a party filed under R. L.

c. 173, § 112, and does not enlarge in any way the jurisdiction of this court to review the exercise of such discretionary power.

This court, in considering whether the discretionary power of a presiding judge in setting aside a verdict was exercised properly, will consider only whether a careful examination of the reasons of the judge, filed in compliance with St. 1911, c. 501, discloses any abuse of judicial discretion or any overstepping the limits of his jurisdiction or failure to comply with the reasonable regulations of the statutes.

Where a presiding judge, after a verdict had been returned for a plaintiff in a large amount, made an order that, unless the plaintiff should remit a substantial amount named, the verdict should be set aside and a new trial granted upon the question of damages only and also ordered that a special finding of the jury that no damages should be awarded upon a certain claim asserted by the plaintiff should "stand and no new trial be had upon that issue," this court, in sustaining the judge's exercise of his discretion in making the order in regard to the setting aside of the verdict, *held* that the order of the judge that the finding for the defendant on a special issue should stand was warranted and did not conflict with the order in regard to setting aside the general verdict.

RUGG, C. J. This case comes before us on a report by a judge of the Superior Court * of questions of law raised upon a motion for setting aside the verdict. *John Hetherington & Sons v. William Firth Co.* 212 Mass. 257. The case was sent to an auditor whose report was for the plaintiff in a large sum. It then was tried before a jury, which also found for the plaintiff in about the same amount. Thereupon the defendants made a motion for a new trial on four different grounds, one being excessive damages. Upon this motion the order was made, "The court adjudges the verdict to be excessive by the sum of eighty-three thousand two hundred ninety-six dollars and seventy-eight cents (\$83,296.78), and the court orders that unless the plaintiff within ten days after the entry of this order shall in writing remit that sum from the verdict then the verdict shall be set aside and a new trial ordered upon the question of damages alone. The special finding of the jury as to the Barre Wool Combing Company business shall stand and no new trial be had upon that issue." This question was, "What amount, if any, for commissions on profits of the Barre Wool Combing Company is included in the verdict?" to which the answer was, "None." This was equivalent to a finding that the plaintiff was not entitled to any damages for profits arising from that source or to a finding for the defendants on that issue.

* *Fessenden, J.* The verdict was for \$154,216.89.

At common law the power of the judge presiding over a jury trial to set aside the verdict upon any ground recognized by the law was limited only by sound judicial discretion. *Ellis v. Ginsburg*, 163 Mass. 143. It was only in an extraordinary case, revealing an abuse of judicial discretion, *Simmons v. Fish*, 210 Mass. 563, 572, or an excess of jurisdiction, *Shanahan v. Boston & Northern Street Railway*, 193 Mass. 412, or similar error that an appellate court could review the action of the trial judge in setting aside a verdict. The exercise of such discretion in an ordinary case was not subject to revision. *Parker v. Griffith*, 172 Mass. 87. *Lopes v. Connolly*, 210 Mass. 487, 496.

The exercise of this power has been regulated by the Legislature to the extent that a verdict can be set aside only upon a motion in writing filed by one of the parties stating the reasons relied on. R. L. c. 173, § 112. *Peirson v. Boston Elevated Railway*, 191 Mass. 223, 229. Failure to observe reasonable regulations of this sort apparent upon the record is cause for nullifying the action of the trial court. *James v. Boston Elevated Railway*, 213 Mass. 424. By St. 1911, c. 501, it has been provided further that in setting aside a verdict the judge "granting the motion for the new trial shall file a statement setting forth fully the grounds upon which the motion is granted, which statement shall be a part of the record." Before this statute was enacted the justices of the Supreme Judicial Court advised the Senate that it would be constitutional. In the course of that opinion, it was said, "We deem it the established law of this Commonwealth that the right of each party to have the assistance and protection of the presiding judge, including the power on the part of the judge to set aside the verdict for good cause, is a part of his right to a trial by jury, secured to him by the Constitution of the Commonwealth. . . . The requirement that a judge shall file a statement setting forth the grounds upon which the motion is granted is a reasonable regulation that does not injuriously affect the rights of either party." *Opinion of the Justices*, 207 Mass. 606, 609, 610. The language of the statute is to be interpreted in the light of this statement of the undoubted law. The power of the judge presiding over the jury trial to set aside the verdict for any reason recognized by law which is a part of the constitutional right of trial by jury, may be put forth only in the exercise of a sound judicial

discretion, and not for any arbitrary or whimsical reason. *Powers v. Bergman*, 210 Mass. 346. *Welsh v. Milton Water Co.* 200 Mass. 409. There is nothing in this statute which indicates a purpose to take away this discretionary power or to narrow it in any way. The aim of the statute simply is to require that the judge put in writing a statement of the ground or grounds upon which he bases his action in setting aside the verdict, and to make that a part of the record. It does not undertake to make the exercise of that power subject to exception or revision in any other manner than it had been under the earlier statutes. It does not enlarge in any way the jurisdiction of this court to review the exercise of that power by the trial court. It affects the form of the exercise of the power and not its substance. The exercise of judicial discretion stands now just where it stood before the enactment of the statute. The only additional requisite is that the reasons which move the judge to the exercise of that discretionary power shall be made a matter of record. One effect of the statute well may be to impress upon the mind of the judge that a verdict of a jury is not to be dealt with lightly. It gives assurance to parties that it has not been set aside inadvertently or without careful reflection and deliberate formulation of the grounds on which such action is founded. It serves to emphasize the well recognized and basic principle that in trials by jury at common law the settlement of controverted facts rests with the jury whose decision is to be final, except in those unusual cases where it is manifest that their trust has been mistaken or abused, or where the verdict appears to the trial judge to be so "greatly against the weight of the evidence as to induce in his mind the strong belief that it was not due to a careful consideration of the evidence, but that it was the product of bias, misapprehension or prejudice." *Scannell v. Boston Elevated Railway*, 208 Mass. 513. *Baker v. Briggs*, 8 Pick. 122, 126. *Treanor v. Donahoe*, 9 Cush. 228, 231.

But the statute goes no further than this. It does not attempt to make the exercise of the judicial discretion vested in the trial court subject to review or revision. It does not mean that this court is to examine all the evidence in every case and determine whether it would have set the verdict aside. Moreover, it is open to grave doubt whether a jury trial shorn of such discretionary power of the presiding magistrate would satisfy the re-

quirement of the Constitution. But however that may be, it is enough to say that this statute does not aim at any such end.

One of the grounds alleged in the motion for setting aside the verdict was that the damages were excessive. It is upon that ground that the trial judge set aside the verdict unless a certain amount was remitted. This long has been recognized as a legal ground for setting aside a verdict. It also is referred to as a ground in St. 1911, c. 501. He set forth the reasons at length, perhaps with greater amplification than was required. A careful examination of them fails to disclose an abuse of judicial discretion or any travelling outside the limit of his jurisdiction or failure to comply with the reasonable regulations of the statutes. Further than this we ought not to go in our scrutiny of them.

The additional order of the court that the answer of the jury, in substance to the effect that the plaintiff was entitled to no share in the profits made by the Barre Wool Combing Company, should stand was warranted. This was not setting aside of a part of the verdict and retaining another part which the judge thought was right. That issue was separable from the rest, and might stand by itself. *Burke v. Hodge*, 211 Mass. 156.

Order on motion for new trial to stand.

S. J. Elder, (A. H. Russell & E. M. Moore with him,) for the defendants.

F. H. Stewart, (W. H. Rand, Jr., & J. H. Merrick with him,) for the plaintiff.

FEDERAL TRUST COMPANY vs. BRISTOL COUNTY STREET RAILWAY COMPANY & another.

Suffolk. March 26, 27, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Equity Jurisdiction, To foreclose mortgage of property of street railway company. *Street Railway*. *Superior Court*. *Statute*, Construction. *Mortgage*. *Receiver*. *Estoppel*. *Tax*, Sale. *Bristol County Street Railway Company*. *Taunton and Pawtucket Street Railway Company*.

The omission, in the codification of the railroad and street railway laws in St. 1906, c. 463, of the reference in R. L. c. 112, § 24, to c. 111, § 70, by which the Supreme Judicial Court was given exclusive jurisdiction of all questions

arising out of street railway mortgages, is significant of a legislative purpose to change the law; and, since such codification, the court of appropriate jurisdiction of a suit to foreclose a trust mortgage upon the property of a street railway company is to be determined apart from any express statute.

The Superior Court has jurisdiction of a suit in equity to foreclose a trust mortgage upon the property of a street railway company in this Commonwealth.

In a suit in equity for the foreclosure of a trust mortgage upon the property of a Massachusetts street railway company, the following facts appeared: The trust mortgage was made in January, 1901, after proceedings in compliance with statutory requirements and approval where necessary by the railroad commissioners for the subscription and full payment in cash at par for all capital stock, the issuance of the stock, and the execution and delivery of the mortgage. Eight months later, by a supplemental agreement, bonds of a slightly different tenor, but for the same debt and secured by the same mortgage, were substituted for those previously issued and \$200,000 worth of them were sold to *bona fide* purchasers, the money received from the sale being used in the construction and equipment of the street railway. In a suit in the United States Circuit Court receivers of the property of the street railway company were appointed and, after due proceedings, a decree was made in that court that such property should be sold and conveyed to a purchaser or purchasers at a public auction and should be accepted by him or them subject to the mortgage, which was carefully described. The receivers acted in accordance with the decree, referring to the mortgage in their notices, advertisements and deed. Purchasers at the sale organized a new street railway corporation for the purpose of holding, owning and operating the street railway thus purchased and then conveyed to the new corporation the property they had received from the receivers, referring to the deed of the receivers. *Held*, that the new corporation was estopped to deny the validity of the mortgage on the ground that there were fatal defects in the organization of the original company.

In the above suit it *also was held*, that, because of the explicit nature of the decree as to the mortgage, a provision in the decree of the United States Circuit Court, in substance that the sale should be subject, not only to the mortgage in question, but also to other ordinary liens, and that the purchaser should have the right to contest the establishment of such liens, could not be construed as giving to the new company a right, after the sale and conveyance to it under the circumstances above described, to contest the validity of the mortgage.

It *also was held*, that the issuing of the new bonds in substitution for those originally issued did not invalidate the mortgage.

Where a mortgagee under a trust mortgage of property of a street railway company purchased a tax title of certain land of the company and conveyed it to a receiver duly appointed of the property of the company, reserving "all other interests thereon now on record in" his name, and the receiver conveys all of the property of the company by a deed stating that the conveyance is subject to the mortgage, a title in the land free from the mortgage does not pass to the purchaser from the receiver, because the receiver stood in the place of the company.

BILL IN EQUITY, filed in the Superior Court on June 21, 1909, for the foreclosure of a trust mortgage on street railway property formerly owned by the defendant Bristol County Street

Railway Company and later conveyed by receivers of that company to persons who conveyed it to the defendant Taunton and Pawtucket Street Railway Company, as stated in the opinion.

The suit was referred to Thomas W. Proctor, Esquire, as master. After the filing of his report, the Taunton and Pawtucket Street Railway Company moved for a recommittal of the report to the master, and filed objections and exceptions to the report. After a hearing by *Pierce, J.*, an interlocutory decree was made denying the motion to recommit the report and overruling the exceptions to the report and confirming the report, and thereafter the same defendant moved to dismiss the suit on the ground that the Superior Court had no jurisdiction of it. The motion was heard and denied by *Pierce, J.*, who thereupon reserved and reported the case for determination by this court.

The material facts are stated in the opinion.

C. F. Choate, Jr., (*J. W. Burke* with him,) for the defendant Taunton and Pawtucket Street Railway Company.

J. E. Cotter & J. P. Fagan, for the plaintiff.

RUGG, C. J. This is a bill in equity brought in the Superior Court for the foreclosure of a trust mortgage upon a street railway property, securing an issue of \$200,000 of the bonds of the Bristol County Street Railway Company.

The defendants attack the jurisdiction of the Superior Court, and assert that a proceeding like the present can be brought in the Supreme Judicial Court alone. Jurisdiction to foreclose a mortgage upon a railroad from the first until now has been vested exclusively in the Supreme Judicial Court. St. 1857, c. 178, § 5. Gen. Sts. c. 63, § 128. Pub. Sts. c. 112, § 70. R. L. c. 111, § 70. St. 1906, c. 463, Part II, § 55. The earliest general law authorizing street railway companies to issue mortgage bonds was St. 1889, c. 316. Section 3 of this act vested jurisdiction as to foreclosure in the Supreme Judicial Court by reference to Pub. Sts. c. 112, § 70, and this reference was continued by R. L. c. 112, § 24. But this latter section disappeared when the railroad and street railway laws were codified in St. 1906, c. 463. This is significant of a legislative purpose to change the law when the subject theretofore had been embodied in a separate section. The "issue of bonds" is governed in some detail by § 103 of Part III of that act, but nothing is said about the foreclosure of

the mortgage by which they are secured. There is in this section an inclusive reference to § 55 of Part II, but this reference in the connection in which it occurs does not quite outweigh the inference that arises from the entire and unexplained omission of a whole section which previously had governed the jurisdictional aspects of a mortgage foreclosure. Therefore, we incline to the view, though with some hesitation, that the court of appropriate jurisdiction is to be determined apart from any express statute. The Superior Court has general jurisdiction in equity. R. L. c. 159, § 1. The foreclosure of a trust mortgage of this nature falls under equitable jurisprudence. *Old Colony Trust Co. v. Great White Spirit Co.* 178 Mass. 92. Hence the present bill was within the jurisdiction of the Superior Court.

The defendants deny the plaintiff's right to any relief by assailing the validity of the mortgage under which the plaintiff asserts all its rights. The material facts in brief are that the Bristol County Street Railway Company was organized as a street railway corporation under general law and received its charter from the secretary of the Commonwealth. It is not and could not well be contended that it did not become a corporation. At all events it would not be possible for the Taunton and Pawtucket Street Railway Company to contest this point, because its only rights in the premises arise from a sale of the franchises and physical assets of the Bristol County Street Railway Company made by the receivers of that company appointed and acting by direction of the United States Circuit Court. Proceedings, in compliance with the terms of the statutes, so far as form is concerned, and where necessary approved by the board of railroad commissioners, were had for the subscription, full payment in cash at par for all the capital stock, the issuance of the capital stock, and for authorizing the execution and delivery of the trust mortgage now sought to be foreclosed.

The trust mortgage was made under date of January 25, 1901, to secure a maximum issue of bonds of \$250,000, but in no event to exceed \$175,000 without consent of holders of all outstanding bonds. Bonds to the amount of \$120,000 were issued at this time. On August 20, 1901, an agreement was made between the plaintiff as mortgagee and the Bristol County Street Railway Company supplemental to the trust mortgage, reciting that it

was the desire of the parties in interest to surrender the bonds previously issued and receive in lieu thereof, but for the same debt, other bonds of like amount omitting a provision for call for payment before maturity and extending the limit for further bonds to \$250,000 without reservation and for the total issue of \$200,000 of such bonds. These bonds were sold in the market at or near par, and now all are held by *bona fide* purchasers for value, ignorant of any irregularity in their issue, and the money received therefrom was used in the initial construction and equipment of the street railway. After it was in operation, receivers of its property were appointed by the United States Circuit Court.

After due proceedings were had, a sale of the "property, locations, franchises and assets" of the Bristol County Street Railway Company was authorized by a decree which contained among other provisions the following: that the same "shall be sold and shall be conveyed to the purchaser or purchasers and shall be accepted by the purchaser or purchasers, subject to the first mortgage dated the 25th day of January, 1901, given by the Bristol County Street Railway Company to the Federal Trust Company of Boston, trustee, to secure an authorized issue of two hundred and fifty thousand dollars (\$250,000) five per cent first mortgage bonds of which two hundred thousand dollars (\$200,000) have been issued and are now outstanding, and accrued interest thereon from July, 1904, to the date of the sale and expenses, disbursements and fees of said trustee under said mortgage as provided in said mortgage;" and which "required the receivers to execute proper deeds of the property so to be sold, "subject, however, to the aforesaid mortgage given by the Bristol County Street Railway Company to the Federal Trust Company as Trustee, and accrued interest thereon, and expenses, disbursements and fees of the trustee under said mortgage as provided in said mortgage." The advertisement of sale described the property and, following the decree, stated that the property would be sold subject to the mortgage. The receivers' report of sale declared that the sale had been made "in pursuance of said decree and of said advertisements." The receivers' petition to confirm the sale further averred that the sale had been made pursuant to the decree and "subject to the mortgage . . . in said decree referred to." The deed of sale executed by the receivers pursuant

to the decree stated in express terms that the property was conveyed "subject to the provisions in the decree of sale."

The receivers' sale was made on December 17, 1904, to three individuals, and a deed therefor was executed under date of February 10, 1905. Two of the three purchasers with their associates to the number in all of fifteen, in compliance with R. L. c. 112, § 13, filed in the office of the secretary of the Commonwealth their agreement of association. On December 22, 1904, with the intention as therein stated, "'of forming a corporation' to be called Taunton & Pawtucket Street Railway Company, 'for the purpose of holding, owning and operating the street railway of the Bristol County Street Railway Company' theretofore 'purchased by certain of the subscribers at a sale by the receivers of said Bristol County Street Railway Company . . . under a decree of the Circuit Court of the United States.'"

The other provisions of the statute being complied with, the Taunton and Pawtucket Street Railway Company was organized as provided by law, and the purchasers at the receivers' sale conveyed the property to it by deed, referring for description to the receivers' deed to them. Thereby, by virtue of § 12, it held and possessed all the rights, franchises and property "with the same rights and privileges and subject to the same duties and liabilities as the original street railway company," that is, the Bristol County Street Railway Company.

This new company now assails the trust mortgage as invalid, and seeks to relieve itself and its property from liability under it, because, as it says, there were fatal defects in the organization of the original company not appearing on any public record but disclosed by investigation of its internal affairs, in that cash was not paid for its capital stock as required by law, and that stock thus issued without being paid for voted to issue the mortgage, and that divers certificates filed as a prerequisite to approval by the railroad commissioners of essential steps in the organization of the company in fact were false.

Under the facts thus disclosed the Taunton and Pawtucket Street Railway Company is estopped to deny the validity of the mortgage. The exact point to be decided is, what was sold and what was bought under the receivers' sale. The decree of the United States Circuit Court was explicit as to that which was ordered

to be sold. Its language hardly could have been made more unequivocal or unmistakable in its terms. The property of the old railway is described in comprehensive words. Then follows the definite direction that the sale and conveyance shall be made by the receivers and accepted by the purchasers subject to the mortgage, which is identified not only by date but by a detailed definition of the extent of the obligations created thereby. It would have been competent in the receivership proceedings for any unsecured creditor to have attacked the mortgage and tried to get it set aside. It does not appear whether that was done.

However that may be, not only did the decree for sale make the property subject to the mortgage in question, but provided further that it should be sold subject to other outstanding liens, and gave to the purchaser the right to contest the establishment of any such other liens. The Taunton and Pawtucket Street Railway Company contends that this clause goes far enough to permit it to contest even the legality of the mortgage. But this position is untenable. The decree by its language draws a clear distinction between the mortgage and the other liens. While it expressly permits the purchaser to dispute the other liens, it makes no such provision touching the mortgage. The provisions of the statute authorizing the organization of a new company to take over the property of the old one in the hands of the receivers render it highly reasonable to continue uninterrupted any outstanding mortgage. The conclusion is irresistible as matter of interpretation of the decree, in the light of all attendant conditions, that the validity of the mortgage was established at least to the extent of sealing the lips of the purchaser against questioning it. There well may have been reasons obtaining during the receivership which made such provision for the interests of all the parties. The language of the decree with its precise and ample recitals that the purchase shall be subject to the mortgage of the plaintiff discloses a purpose that its validity shall not be attacked by the purchaser or those claiming under the purchaser. The price obtained by the receivers was based upon the assumption that the purchaser would be obliged to pay, or assume the obligation to pay, so far as secured by the property, the sum of this mortgage, and the cash passing to the receivers was diminished by that

amount. The thing which was conveyed by the receivers was in substance the equity above the mortgage.

The position of the new company does not commend itself to a court of equity, and its contentions would not be sustained unless required by the law. The money furnished by the bondholders was used in the construction of the railway. The statutes of the Commonwealth make full provision for a supervision by the railroad commissioners of the issue of all stocks and bonds and the keeping of careful records. The right of the original company to issue these bonds on the face of the records was perfect. Careful scrutiny of all the public records, which cover every material step in the incorporation, capitalization and bonding of the street railway, reveals no flaw in the title acquired by the plaintiff as mortgagee. The validity of the mortgage was recognized in the decree for receivers' sale and their deed was made subject expressly to the mortgage. The conveyance by the purchasers at the receivers' sale to the Taunton and Pawtucket Street Railway Company was of the same property conveyed to them by the receivers. Hence it can stand no better than their grantors, who took "subject to the provisions in the decree of sale." See *Kelley v. Newburyport & Amesbury Horse Railroad*, 141 Mass. 496; *Day v. Worcester, Nashua, & Rochester Railroad*, 151 Mass. 302.

It was said in *Johnson v. Thompson*, 129 Mass. 398, at page 400, "It is a settled principle of law that a grantee is estopped to deny the validity of any mortgage to which his deed recites that the conveyance to him is subject. *Tuite v. Stevens*, 98 Mass. 305. *Howard v. Chase*, 104 Mass. 249." Numerous other authorities support this proposition. *Pecker v. Silsby*, 123 Mass. 108. *Swann v. Wright*, 110 U. S. 590. *American Water Works Co. v. Farmers' Loan & Trust Co.* 20 C. C. A. 133; S. C. 163 U. S. 675. *Freeman v. Auld*, 44 N. Y. 50. *Home Trust Co. v. Bauchens*, 151 App. Div. (N. Y.) 416. *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554, is distinguishable in that, as there was said, "The description of the premises . . . as subject to this mortgage, and the exception of the mortgage out of his covenants in that deed, were for the purpose of protecting him from liability upon his covenants." *Hackensack Water Co. v. DeKay*, 9 Stew. 548, especially relied on by the defendant, is distinguishable in that there the officer making the conveyance undertook to go beyond

his authority in subjecting the property to an incumbrance, while here the receivers followed exactly the decree of a court of ample jurisdiction. In *Commonwealth v. Smith*, 10 Allen, 448, the bonds were held void because the corporation was forbidden by law to issue bonds. In the case at bar there was ample authority in law for the issuance of the bonds, and the only invalidity urged is the faithlessness and perfidy of the officers of the first corporation in making false returns to public boards and in failing to make and requiring to be made payments for capital stock.

The supplemental agreement of August, 1901, whereby new bonds of slightly different tenor were substituted for those issued in January of that year, but for the same debt and secured by the same mortgage and bearing the same date, did not invalidate the mortgage and its security. The new company is also estopped by the terms of the decree for the receivers' sale from raising now any question as to whatever irregularity there may have been respecting the transaction if any there was.

What has been said disposes of most of the material issues raised on the record. A few subsidiary matters remain to be mentioned.

The finding of the master that the original corporation did not principally transact its business at Boston is conclusive since the evidence is not reported. It appears to have been right upon the facts reported. See *Collector of Taxes of Boston v. Mount Auburn Cemetery*, 217 Mass. 286. Hence it was not necessary that the mortgage should be recorded in Boston.

The Federal Trust Company was purchaser of certain land belonging to the original company by a tax deed from the tax collector of Attleborough, and it released to the receivers its rights thereunder, reserving "all other interests thereon now on record in its name." This was not a conveyance of a tax title to an independent third person. The receivers were acting for the original company. Manifestly a title adversary to the mortgagee was not conveyed by this release. Moreover, no evidence was introduced to show that the things necessary to the validity of the tax deed had been done. *Burke v. Burke*, 170 Mass. 499. *Connors v. Lowell*, 209 Mass. 111. *Weld v. Clarke*, 209 Mass. 9. It does not appear that St. 1911, c. 370, was applicable under all the circumstances.

This disposes of all objections to the master's report which

now are material. The interlocutory decree denying the motion to recommit the report to the master, overruling the exceptions to the master's report, and confirming the master's report, is to be affirmed. Decree is to be entered denying the motion to dismiss the bill for want of jurisdiction, and establishing the plaintiff's mortgage as supplemented and amended as a valid first mortgage lien for the benefit of the holders of the \$200,000 of bonds, and ordering foreclosure. The details are to be settled in the Superior Court.

So ordered.

PHILIP S. ARONSON vs. SAMUEL NURENBERG & another.

Suffolk. May 18, 1914. — June 17, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Practice, Civil, Amendment, Exceptions. Bills and Notes, Indorsement. Contract, In writing.

The denial in an action at law of a motion by the defendant to amend his answer is wholly within the discretionary power of the presiding judge and is not open to exception.

In an action by a holder in due course of a negotiable promissory note indorsed by the payee in blank, against such payee as indorser, it is no defense that "before and at the time of the indorsement, it was agreed, orally, that said indorsement was to be without recourse to him."

CONTRACT against the maker and indorsers of a negotiable promissory note of one Ettel Nurenberg for \$1,583.35, payable in quarterly instalments of \$50 to Max Sokolowitz and indorsed by Harvey Nurenberg and Samuel Nurenberg and by Max Sokolowitz in blank. Writ in the Municipal Court of the City of Boston dated August 31, 1912.

On appeal to the Superior Court the case was tried before *White, J.* The defendant Sokolowitz moved to amend his answer by alleging "that prior to the indorsement of the note in question in this suit the plaintiff and defendant mutually agreed that the defendant indorse the same without recourse to him in any event, that said indorsement upon said note was obtained

by the plaintiff through false and fraudulent representations." The motion was denied. The bill of exceptions recites:

"Signatures of the maker and indorsers of said note having been admitted, the plaintiff offered in evidence said note and certificates of protest and rested.

"The defendant offered evidence tending to show the defendant, Max Sokolowitz, indorsed said note, but before and at the time of the indorsement, it was agreed, orally, that said indorsement was to be without recourse to him."

The defendant Sokolowitz offered no further evidence and the judge ordered a verdict for the plaintiff in the sum of \$407.24. The defendant Sokolowitz alleged exceptions.

The case was submitted on briefs.

H. I. Morrison, for the defendant Sokolowitz.

M. L. Lourie, J. H. Blanchard & H. C. Blanchard, for the plaintiff.

CROSBY, J. 1. The denial of the motion to amend the defendant's answer was wholly within the discretion of the presiding judge, and is not open to exception. *Lang v. Bunker*, 6 Allen, 61. *Smith v. Whiting*, 100 Mass. 122.

2. If the amendment had been allowed the evidence offered did not set up a legal defense to the note. When the defendant Sokolowitz, who will hereinafter be called the defendant, placed his signature upon the back of the note without qualification he became an indorser. R. L. c. 73, § 80. If the defendant's only intention was to indorse the note for the purpose of transferring title to the plaintiff, without incurring any personal liability, he could have accomplished that purpose by adding to his signature the words "without recourse," or any words of similar import. R. L. c. 73, § 55. Having indorsed the note without qualification he became liable to the plaintiff for the amount due thereon. Evidence of an oral agreement that at the time the defendant indorsed the note such indorsement was to be without recourse as to him was rightly excluded. Such evidence would tend to vary and control a written instrument absolute in its terms by parol, and was clearly incompetent. *Wooley v. Cobb*, 165 Mass. 503. *Essex Co. v. Edmands*, 12 Gray, 273, 279. *Wright v. Morse*, 9 Gray, 337, 339. *Prescott Bank v. Caverly*, 7 Gray, 217. This conclusion is not at variance with *Lewis v. Monahan*,

173 Mass. 122, and *Shea v. Vahey*, 215 Mass. 80, relied on by the defendant. There is no question that indorsers upon a note may make among themselves a valid agreement that the liability of either shall be different from that which the law otherwise would impose, but that principle has no application to this case.

Exceptions overruled.

ATTORNEY GENERAL vs. JOSEPH BEDARD & others.

Suffolk. May 18, 1914. — June 17, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Charity. Trust. Attorney General. Equity Jurisdiction, For an accounting. Labor Union. Strikes.

If, at the time of a strike of many thousands of operatives employed in a manufacturing centre, resulting in suffering and privation among them and their families, a committee, organized for the purpose of supporting the strike and also for the support of those strikers who were suffering and in want, appealed for funds for the relief of the strikers in want and received many thousands of dollars from many persons both in this Commonwealth and elsewhere who were moved by the appeal and by the suffering incident to the strike, and such committee expended a part of such money for purposes different from those for which it was contributed, such as salaries, board and personal expenses, legal expenses and counsel fees for some of their own number, transportation of children to other cities for the purpose of making further appeals, and contributions to a national organization of the strikers, it is the duty of the Attorney General, at the relation of some of the contributors, to enforce by an information in equity the application of the funds so raised to the charitable purposes for which they were contributed, and a demurrer to such an information, brought against the secretary, treasurer and other members of the committee, must be overruled.

Where a committee, organized for the purpose of supporting a strike of many thousands of operatives in a textile manufacturing centre and also for the support of those strikers who are in suffering and want, in response to an appeal issued by them for money with which to relieve such want, receives a large fund for that purpose, those members of such committee who become the custodians and managers of the fund are under the same obligation as to the fund as if they expressly had been made trustees thereof; they must account for it and can be credited in the accounting only with disbursements made for the purposes of the trust; they must be charged with everything for which they do not properly account; they are bound to keep the fund distinguished from other moneys in their hands, and the consequences of any failure on their part to keep it so distinguished must fall upon themselves.

If the custodians and managers of such fund deliver to the chairman of their committee, who is not a custodian or manager but who was present during a large part of the strike and was the secretary of a national organization of the strikers, checks on the funds in a bank which are payable to third persons and which he knows are to be used for other purposes than those for which the fund was given, and such member receives the checks and delivers them to the payees, who thereupon receive the amount thereof, he is jointly responsible with the custodians and managers for the amount of those checks.

INFORMATION IN EQUITY, filed on March 11, 1912, by the Attorney General at the relation of James M. Prendergast, Herbert S. Johnson and Robert A. Woods against Joseph Bedard, Joseph Shaheen, William D. Haywood, Joseph J. Ettor, William Yates, William Trautmann and the Lawrence Trust Company. .

Allegations of the information were in substance as follows:

For many weeks the many thousand operatives employed in the textile mills at Lawrence had been on a strike and during that period, because of lack of wages, a large number of them had come to be in suffering and distress for want of proper food and clothing. The personal defendants were leaders of the strike, or members of a "strike committee," organized for the purpose of supporting the strike, and, among other things, of raising funds to be applied for the support of those strikers who were suffering and in want. The defendant Bedard was the secretary and the defendant Shaheen was the treasurer of the strike committee.

For the purpose of raising a fund to be applied for the relief of such strikers as were in want, the personal defendants made and issued appeals to the public generally for contributions to the committee or its executive officers, representing that the funds would be applied by the committee and officers to the support of such of the strikers and their families as were in need, suffering and want. An appeal widely circulated read as follows:

"No.

"Help your fellow workers who need bread and your support.

"Twenty-five thousand men, women and children, employed in the textile mills of Lawrence, mostly employees of the American Woolen Co. are out on strike against a reduction in wages that at best was only an average of five to six dollars a week.

"The textile industry, especially the wool portion that receives the highest protection, pays the lowest wage scale of any industry in America.

"Workers have dared to rebel against conditions that were unbearable. Because they have dared to assert their manhood and womanhood and determinedly insisted for an opportunity to live by their labor, hired military hessians have been sent to Lawrence to terrorize the workers into going back to work.

"We workers, who have done our utmost share to clothe the world, are now asking the world of labor and all those who sympathize with the cause of the workers for bread.

"Contribute liberally. It is our fight to-day, who knows, it may be you to-morrow who will need support.

"Issued by authority of the Textile Workers' Strike Committee.

Joseph Bedard, Secretary,
9 Mason Street,
Lawrence, Mass.

Name	Address	Amount"
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Many inhabitants of this Commonwealth and of other States, including the relators Prendergast and Johnson, being moved by such appeals and by sympathy for the poverty and suffering of the strikers and their families, and with a purpose and desire of aiding and benefiting such destitute persons, contributed for that purpose various sums of money amounting to many thousands of dollars, and delivered such sums to the defendant Bedard and to the other personal defendants to be held and used by them in trust to apply for the relief of the destitute and needy among the strikers and their families according to the tenor of the appeal above set out and other similar appeals. The defendant Lawrence Trust Company was the depository of such funds.

The fifth paragraph of the information was as follows: "5. The plaintiff is informed and believes, and upon information and belief avers, that all the personal defendants, conspiring and agreeing together, have used substantial portions of said fund contributed as aforesaid for purposes entirely different from those for which the fund was donated by the contributors, and for purposes other than the proper promotion of the objects of the trust on account of which said contributions were made and received; that said fund has, in part at least, been improperly used for the private and personal uses of the personal defendants and their associates; that the personal defendants, or some of them, have

drawn sums from said fund as salaries — a purpose for which they had no right to appropriate the same; that among other improper uses substantial amounts have been contributed for the board and other private expenses of the defendant Ettor, now in confinement in the jail at said Lawrence; large amounts have been paid for the transportation, to the city of New York and other cities, of numbers of children for uses in connection with appeals for further contributions to said fund; sums have been paid to counsel and others engaged in defending said Ettor and others against criminal charges; and that large amounts have been turned over to an organization known as Industrial Workers of the World; all of said uses being contrary to the intent and purposes for which said fund was contributed, and in violation of the trust upon which said fund is held. There is danger that said fund, and other contributions thereto, may be further appropriated to uses other than those for which it is contributed, and further dissipated in illegal, improper expenditures, in violation of the trust.”

The information further alleged a demand for an accounting and a failure to render an adequate accounting.

The prayers of the information were for temporary and permanent injunctions preventing the use of the fund for other purposes than those for which it was given, for a receiver to take charge of the fund, and “that an account be taken in relation to said trust fund and the amount thereof, and that an inquiry be made as to the extent of improper and illegal disbursements from said fund by the defendants, or any of them, or others controlling the same, and that the said defendants be made to account for and restore to said fund all sums improperly abstracted therefrom, and pay over to such receiver such amounts of said fund as shall have been found to have been wrongfully taken therefrom.”

The personal defendants demurred. The demurrers were heard by *Morton, J.*, and were overruled. The defendants appealed.

The case was referred to Winfield S. Slocum, Esquire, as master. He filed a report, and, upon a recommittal, a supplemental report. His findings as to the strike in Lawrence, the description of the personal defendants' official positions and the form of appeals for funds by the defendants were substantially in accord-

ance with the allegations of the information. Other material findings were as follows:

The strike in the Lawrence textile mills began on January 12 and ended on March 16, 1912. During the period of the strike the strike committee, described in the bill, received \$62,564.40, "a large portion, but not all," of which was "received . . . in answer to the appeal" described on pages 379, 380.

The supplemental report of the master contained the following findings: "After the receipt of such funds they were so commingled and used that I am unable to find or state for what they were contributed excepting the following: During the period of the strike, meetings were held and money raised by the Socialists of Boston for general strike purposes. The amount of such funds so contributed was \$3,316.01. This amount was paid in and mingled with the general fund."

"All sums received from whatsoever source were mingled in one common fund.

"The offices of the strike committee were at No. 9 Mason street, Lawrence. In these offices correspondence was received and sent, the appeals for help were distributed, money was received and disbursed, the books of account were kept, and the financial business of the strike conducted. The defendant Shaheen was treasurer of the strike committee and was responsible for its funds. He signed checks, went to said headquarters nearly every day, and he also made some of the deposits in the bank. All checks were signed by Shaheen as treasurer, and by the defendant Joseph Bedard as financial secretary. Bedard was in general charge from the beginning of the strike to its end, was the financial secretary, and in charge of the headquarters. Funds in general were received by him, and were in his custody and deposited by him in bank. The defendants William Trautmann and William Yates were sent to Lawrence from the national headquarters of the Industrial Workers of the World because of their experience in affairs of this kind. Trautmann came about February 10, and took charge of and established the system of bookkeeping. He received some of the money, made some of the deposits in bank, and attended to and supervised the correspondence. Yates was secretary of the National Industrial Union of Textile Workers. He was chairman of the strike committee at Lawrence, and was

there from January 29 to the end of the strike. To some extent he also attended to the correspondence. . . .

"A large part of the money was deposited in the Lawrence Trust Company, in the name of the Industrial Workers of the World, Local No. 20. Other sums were not deposited in bank, but were kept or used as cash.

"I find that all of these defendants were responsible for such commingling of funds.

"They failed also to show, in respect to such funds in their possession or subject to their control, what amounts were contributed for charitable purposes and what amounts were contributed for other objects."

Of the funds so received, the master found that \$18,695.86 was expended for other than charitable purposes. Of this sum, \$2,800 was represented by a check payable to one Vincent St. John of Chicago, Illinois, who was secretary of the national organization of the Industrial Workers of the World, and \$3,000 by a check payable to one Thomas Powers, a textile worker of Providence, Rhode Island, both checks being given to Yates. The master found Yates responsible for these two sums, and found Shaheen, Bedard and Trautmann responsible for the entire \$18,695.86.

The master also found that of the foregoing sum \$10,800 was deposited by Bedard in the bank in his own name, and that from that account he drew the above described checks for \$2,800 payable to St. John and \$3,000 payable to Powers, which were given to the defendant Yates, and also a check for \$5,000 payable to one Desire Steuer of Lawrence.

The master also found that there was no evidence that any of the moneys received by the committee were received or paid to the defendants Ettor or Haywood.

Exceptions of the defendants to the first report of the master were waived by them.

The defendants Bedard and Shaheen filed exceptions to the supplemental report of the master, the first two grounds in both exceptions being the same. Only the exceptions of Shaheen contained a third ground. Shaheen's exceptions were upon the following grounds:

"1. That the master failed to credit the total amount expended

for other purposes than relief with the \$3,316.01 contributed by the Socialists for general purposes.

"2. The refusal of the master to rule, as requested, that the total amount expended for purposes other than relief should be credited with the excess expenditures amounting to \$2,886.40.

"3. That he [Shaheen] is responsible for the \$10,800 deposited by Joseph Bedard in the Lawrence Trust Company and for the drafts issued thereon."

The exceptions were heard by *Loring, J.* The record states an interlocutory decree overruling Shaheen's exceptions, but states no decree as to those of Bedard.

A final decree was entered, declaring "that said defendants Bedard, Trautmann, and Shaheen are jointly and severally liable to account for the sum of \$18,695.86, which was found by the master's report to have been paid out of strike funds for purposes other than relief, less the sum of \$3,316.01 found to have been contributed for general purposes, leaving a balance of \$15,379.85; also that said defendant Yates is liable to account for the sums of \$2,800 and \$3,000, paid out of strike funds and not accounted for, as found by the master;" and ordering "that the said defendants, Bedard, Trautmann, and Shaheen pay into the hands of the clerk of this court, to be held by him subject to the further order and direction of this court, said sum of \$15,379.85, together with interest thereon from the date of the filing of the bill in this cause until fully paid; and that the defendant Yates pay into the hands of the clerk of this court, to be held by him, subject to the further order and direction of this court, said sum of \$5,800, together with interest thereon from the date of the filing of the bill in this cause until fully paid; and that the plaintiff also recover his costs against said defendants Bedard, Yates, Trautmann, and Shaheen." The bill was dismissed as against the defendants Ettor and Haywood and the Lawrence Trust Company, with costs.

The defendants Yates, Bedard and Shaheen appealed.

The case was submitted on briefs.

J. F. Lynch, J. P. S. Mahoney & G. E. Roewer, Jr., for the defendants Yates, Bedard and Shaheen.

J. R. Dunbar, R. W. Dunbar & F. Leveroni, for the plaintiff.

SHELDON, J. The demurrer rightly was overruled. According

to the averments of the bill, the fund in question was raised by subscriptions as a relief fund, to relieve the necessities of a very great number of men who had engaged in a strike, and who thus had been left without any means of maintaining themselves and their families. The fund was raised and should be applied for the purposes of a public charitable trust. *Jackson v. Phillips*, 14 Allen, 539, 556. *Attorney General v. Goodell*, 180 Mass. 538. *Attorney General v. Compton*, 1 Y. & C. Ch. 417. *Attorney General v. Kell*, 2 Beav. 575. It was upon the Attorney General that the duty rested of enforcing the proper application of the fund and of compelling the restitution of any part thereof which had been diverted to other purposes. R. L. c. 7, § 6. *Parker v. May*, 5 Cush. 336, 337. *Burbank v. Burbank*, 152 Mass. 254. *Attorney General v. Vivian*, 1 Russ. 226. *Attorney General v. Cockermouth Local Board*, L. R. 18 Eq. 172. *Strickland v. Weldon*, 28 Ch. D. 426. And see *McQuesten v. Attorney General*, 187 Mass. 185. And the occasion for the present application, the misappropriation of the fund by the defendants, is sufficiently averred. *Attorney General v. Parker*, 126 Mass. 216. *Attorney General v. Bishop of Manchester*, L. R. 3 Eq. 436.

The defendants' exceptions to the master's first report were waived, and those exceptions accordingly have been overruled by a decree from which no appeal has been taken.

The exceptions of the defendant Bedard to the master's supplemental report do not appear by the record before us to have been formally decided; but they really were disposed of by the action taken on the exceptions of the defendant Shaheen and by the final decree, which did not charge the defendants Bedard, Shaheen, Trautmann and Yates (hereinafter called the defendants) with any part of the sums contributed for general purposes. The failure to take formal action upon Bedard's exceptions is not material now, but it should be corrected.

The action taken on Shaheen's exceptions was sufficiently favorable to the defendants. The evidence heard by the master is not reported, and we cannot say that his findings were wrong. The defendants received the money in question as a trust fund. They must account for it, and can be credited only with disbursements which actually were made for proper purposes. They must be charged with everything for which they have not prop-

erly accounted. This is a sound principle, and is abundantly supported by authority. *Little v. Phipps*, 208 Mass. 331, 335. *Ashley v. Winkley*, 209 Mass. 509, 525. *Watson v. Thompson*, 12 R. I. 466, 470. *Blauvelt v. Ackerman*, 8 C. E. Green, 495, 502. *Frethey v. Durant*, 24 App. Div. (N. Y.) 58, 61. *Seaward v. Davis*, 133 App. Div. (N. Y.) 191. *Ward v. Armstrong*, 84 Ill. 151. *Chirurg v. Ames*, 138 Iowa, 697. It was for the defendants to keep the trust fund distinguished from other moneys in their hands; and the consequences of any failure on their part to comply with this duty must fall upon themselves. *International Trust Co. v. Boardman*, 149 Mass. 158, 163. *Snailham v. Isherwood*, 151 Mass. 317, 321. *Henderson v. Henderson*, 58 Ala. 582. *Lupton v. White*, 15 Ves. 432.

We cannot doubt that the defendants, the custodians and managers of this fund, are under the same obligations as if they expressly had been made the trustees thereof. *Attorney General v. Compton*, 1 Y. & C. Ch. 417, 426. *In re Hallett's estate*, 13 Ch. D. 696. *Dillon v. Connecticut Mutual Life Ins. Co.* 44 Md. 386.

The defendant Yates rightly is held for the amount which came to his hands. He took it without consideration, and must be taken to have had notice of the trust upon which it was held. *Otis v. Otis*, 167 Mass. 245. But as this is a part of the amount for which the other defendants have been held liable, the decree should be so modified as to make it plain that no double payment is required.

As there has been no appeal by the Attorney General, we cannot consider whether costs rightly were allowed to the defendants Ettor and Haywood.

What we have said disposes of all the material questions. It is not necessary now to determine what disposition finally shall be made of the money ordered to be paid into court.

The decree appealed from must be modified by inserting a statement that Bedard's first exception to the master's supplemental report is sustained and his second exception overruled; by ordering the payment into court of the sum of \$5,800, with interest, by the defendants Bedard, Trautmann, Shaheen and Yates, and of the further sum of \$9,579.85, with interest, by the defendants Bedard, Trautmann and Shaheen; and by stating the

amount of the costs ordered to be paid. So modified, the decree must be affirmed with costs against the defendants Yates, Bedard and Shaheen, being the only parties who have appealed from the decree.

So ordered.

ANDREW A. GRANARA & others vs. ITALIAN CATHOLIC CEMETERY
ASSOCIATION & others.

Suffolk. May 18, 1914. — June 17, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Italian Catholic Cemetery Association. Cemetery. Corporation, Cemetery. Constitutional Law. Equity Jurisdiction, To relieve from results of fraud. Mandamus. Equity Pleading and Practice, Demurrer.

St. 1913, c. 292, confirming and making valid the by-laws of the Italian Catholic Cemetery Association, which had been incorporated in 1905 under R. L. cc. 78, 123, and unauthorized acts of its incorporators in voting to issue and in issuing shares of capital stock and fixing the par value of the stock and the rights of holders thereof, occasioned no breach of contract nor impairment of lawfully vested rights of property, and is constitutional.

A bill in equity by stockholders in a corporation, alleged to have been brought on behalf of the plaintiffs and all other stockholders who might wish to join therein, may be maintained against the corporation and officers and others in control of its affairs for an accounting as to shares of stock issued to the individual defendants as a gratuity, dividends declared and paid on such shares, moneys received and disbursed by the defendants in the management of the corporation for which, although requested, they have refused to account, and fees and compensation paid to themselves in excess of reasonable emolument or rightful demands.

If, after the incorporation of a cemetery corporation in 1905 under R. L. cc. 78, 123, the incorporators illegally issued and sold capital stock for cash and then adopted by-laws excluding the purchasers of such stock from participation in the business affairs of the corporation and perpetuating its control in themselves and their nominees, and in 1913 the Legislature by a special act confirmed and made valid the issue of stock and the by-laws, the persons to whom the stock was issued thereafter have the rights of stockholders, and, if such rights are not recognized and those in control of the corporation refuse to call meetings of the corporation for the choice of officers and the adoption of by-laws adapted to the reorganized association, no longer composed of the original incorporators and their successors, but of stockholders, the remedy is by a petition for a writ of mandamus, and not by a bill in equity.

A single demurrer to an entire bill in equity, which contains allegations entitling the plaintiff to some of the relief which he seeks, will be overruled, although other relief sought is not a proper subject for a bill in equity.

BILL IN EQUITY, filed in the Supreme Judicial Court on June 25, 1913, and afterwards amended, by alleged stockholders of the Italian Catholic Cemetery Association against the corporation and six individuals who were its officers and directors, seeking to have the status of the plaintiffs as to the defendant corporation established, to have certain by-laws of the corporation declared to be void, and to compel the individual defendants, officers of the corporation, to account for funds alleged to have been misapplied by them.

The plaintiffs alleged that the bill was brought on behalf of themselves and all other stockholders who wished to join therein. Other allegations of the bill as amended were in substance as follows:

The defendant corporation was organized in December, 1905, under R. L. cc. 78, 123, with nine incorporators (six of whom were defendants) for the purpose of establishing and maintaining a cemetery. Immediately after organization it was capitalized at \$50,000, divided into five hundred shares of the par value of \$100. Two hundred and fifty-one of the shares were sold at par and the proceeds, \$25,000, were paid into the corporation treasury. The plaintiffs own a majority of the two hundred and fifty-one shares.

After such two hundred and fifty-one shares were issued and sold, the defendants, without the knowledge or consent of the association or of its stockholders or of the plaintiffs, and without any just reason or lawful authority, issued and gave to each of the officers and incorporators ten shares out of the remaining unissued capital stock of the association, ninety shares in all. The defendants received and at the time of the filing of the bill held sixty of the ninety shares, which gave to them the majority of the issued and outstanding capital stock of the association. They had received several dividends and had voted upon such shares. Such shares were issued "in order that said officers would have, and thereby they have had and do now have, the complete control and management of said association, and in order that they could manage, and thereby they have managed and do now

manage its business and affairs for their own personal benefit, and not for the benefit of said association."

The defendants, "ever since the organization of the association, have acted, and are now acting, under certain alleged by-laws that provide, in substance and in effect, that the entire government and control and management of said association shall be vested in said officers and in successors to be selected by them, and that said officers shall be elected by and from said officers and incorporators, and that any vacancy shall be filled by the remaining officers, and that the stockholders of said association and your petitioners are not eligible to hold any office or to vote at any meeting or at any election of officers; that said by-laws were intended by said officers to perpetuate them, and do perpetuate them, and their successors to be selected by them, in the control and management of said association, by usurping the powers of said association and its stockholders and denying the rights to said stockholders and your petitioners which are guaranteed by the laws of said commonwealth; that said by-laws were never submitted to or approved or adopted by said association or by its stockholders or at any meeting of said officers or incorporators."

The defendants had excluded the plaintiffs from any participation in the business affairs of the corporation, and they refused to make any report or give any information about the association to any of the stockholders, except the defendants.

"Great sums of money, approximating \$100,000, have been received and paid out by the defendants, . . . a large part of which is the money paid into the association by the plaintiffs. Without any lawful authority the defendants have paid, and are now paying, to themselves and to others, excessive compensation and fees for alleged services and expenses, and as gratuities for which no service was rendered, or being rendered, or expense incurred." The defendants "are conducting the association for their own personal and private gain and profit in a way that will bring scandal upon said association." The plaintiffs alleged that they could not give further specifications "for the reason that said officers refuse to make any report on the transactions, or to account therefor, except to themselves, and they refuse to answer questions, or to allow their books of account to be examined by your petitioners."

On March 19, 1913, St. 1913, c. 292, was enacted. It is quoted in the opinion.

After the enactment of the statute the defendants continued to refuse to recognize the plaintiffs' alleged rights as stockholders.

The prayers of the bill were in substance that the status of the plaintiffs and of the stockholders of the association be defined and established; that a meeting of the stockholders of the association be held to elect officers and to transact and care for the business of the association upon such terms and conditions as should be fixed by the court; that the by-laws complained of be declared null and void; that the acts and doings of the officers in issuing the above described sixty shares be declared null and void, and that the officers be ordered to return the shares to the association, or to account therefor; that all the acts and doings of the officers complained of as contrary to law, should be declared null and void; that the association and its officers be ordered to give forthwith "a true and just account of all the moneys and property of said association which have been received and expended, and of the debts and credits outstanding, and of all services."

The defendants demurred. The case was reserved by *De Courcy, J.*, for determination by this court.

The case was submitted on briefs.

H. S. Davis & F. Leveroni, for the defendants.

J. H. Burke, R. Walsworth & J. L. Porcella, for the plaintiffs.

BRALEY, J. The defendant corporation having been organized under R. L. c. 78, § 1, and c. 123, for the purpose of establishing and maintaining a cemetery, the incorporators had no authority to create a capital stock of \$50,000 divided into five hundred shares with a fixed par value of \$100 each, and to issue certificates for two hundred and fifty-one shares to themselves and to the plaintiffs, who by purchase are averred to have become and now are the holders of a majority of the shares thus issued. R. L. c. 78, § 7. *Monumoi Great Beach v. Rogers*, 1 Mass. 159, 163, 165. *Donnelly v. Boston Catholic Cemetery Association*, 146 Mass. 163, 166. *Packard v. Old Colony Railroad*, 168 Mass. 92. But § 2 of c. 78 provides, that such corporations shall be subject to the provisions of R. L. c. 109. By § 3 of this chapter, which is a re-enactment of Rev. Sts. c. 44, § 23, Gen. Sts. c. 68, § 41, Pub. Sts. c. 105, §§ 2, 3, "All corporations which are organized

under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them." It was doubtless under this reserved power that upon the partly diverse petitions of the plaintiffs and the defendants the Legislature enacted the St. of 1913, c. 292, which provides, that, "The by-laws of the Italian Catholic Cemetery Association, a corporation duly established in the year nineteen hundred and five under the general laws and situated in the city of Boston, and the acts of said corporation in voting to issue and in issuing shares of capital stock and fixing the par value and the rights of stockholders thereof, are hereby confirmed and made valid to the same extent as if at that time the said corporation had authority to issue said stock and to fix the par value thereof and to adopt by-laws." The corporation having been organized while the R. L. c. 109, § 3, were in force, it is subject to those provisions, and is bound by any reasonable amendment and alteration which the Legislature might impose. *Roxbury v. Boston & Providence Railroad*, 6 Cush. 424, 432. And in *Commissioners on Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446, 451, where the Gen. Sts. c. 68, § 41, were considered, it was said, "This statute, first introduced into the general legislation of the Commonwealth by St. 1830, c. 81, . . . has been as much a part of all charters since granted as if inserted therein; and was manifestly adopted with the intention of reserving for the future a fuller parliamentary or legislative power than would otherwise be consistent with the effect to be allowed to the special terms of particular charters, under the judicial construction of the constitutional prohibition against impairing the obligation of contracts." It is then said, that while it is unnecessary to define the extreme limits of the power, "it at least reserves to the Legislature the authority to make any alteration or amendment in a charter granted subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the Legislature may deem necessary to secure either that object or other public or private rights."

The act manifestly on the face of the bill occasions no breach of contract or impairment of lawfully vested rights of property. *Durfee v. Old Colony & Fall River Railroad*, 5 Allen, 230, 241, 242,

243. *Agricultural Branch Railroad v. Winchester*, 13 Allen, 29, 33. *Thornton v. Marginal Freight Railway*, 123 Mass. 32, 34.

The purposes for which the association was incorporated are fully preserved. Its title to the cemetery lands and their management is untouched. The plaintiffs and other purchasers of stock are given their just rights by membership in the corporation where under the averments of the bill the defendants before enactment of the statute had solicited and obtained funds, not as gifts but as investments, under conditions or representations which were unauthorized. *Stewart v. Joyce*, 201 Mass. 301. And any discussion as to the rights of the plaintiffs against the corporation or the individual defendants independently of the St. of 1913, c. 292, is unnecessary. See *Ginn v. Almy*, 212 Mass. 486, 505, 506.

The demurrer, of course, admits every essential allegation of the bill. It appears that the defendants have purchased land and established a cemetery wherein interments have been made, and, the statute being constitutional, the plaintiffs as stockholders are entitled under the allegations of the bill to an accounting for the stock which the defendants issued to themselves as a gratuity, and for the dividends declared and paid thereon, as well as for the moneys they have received and disbursed in the management of the association for which they have refused to account, and the fees and compensation paid to themselves, alleged to have been far in excess of any reasonable emolument or rightful demands. *Von Arnim v. American Tube Works*, 188 Mass. 515, and cases cited.

The bill also asks for the abrogation of the by-law alleged to have been devised by the individual defendants to perpetuate in office themselves, or those whom they might choose to fill vacancies, and that a meeting of the stockholders may be ordered. The enabling statute recognized this by-law as if it had been passed by the stockholders, but, having placed the association upon a basis with corporations organized with a fixed capital divided into transferable shares represented by certificates, the plaintiffs are entitled to attend and vote at corporate meetings held for the election of officers, with the right to participate in dividends and profits. *Fisher v. Essex Bank*, 5 Gray, 373, 378. The corporation is not insolvent, and the act in question is not a scheme to secure primarily the payment of creditors to which,

until accomplished, the rights of stockholders properly may be subordinated as in *Phillips v. Eastern Railroad*, 138 Mass. 122, 126, relied on by the defendants. It is furthermore apparent that our laws relating to the ownership of stock are applicable. R. L. c. 109, §§ 32, 39. *Boston Music Hall Association v. Cory*, 129 Mass. 435, 436. If the defendants refuse to call a meeting for the choice of officers and the adoption of by-laws adapted to the reorganized association, no longer composed of the original incorporators or their successors, but of stockholders, the appropriate remedy is mandamus. *McCarthy v. Street Commissioners*, 188 Mass. 338, 340. *Saltman v. Nesson*, 201 Mass. 534. *Bassett v. Atwater*, 65 Conn. 355. *People v. Cummings*, 72 N. Y. 433. It is for a majority of the lawful stockholders present at the meeting to decide under R. L. c. 109, § 5; c. 123, § 7, what the by-laws of the corporation shall be, subject, however, under c. 78, § 9, to the approval of the State board of health of any by-law which relates to the reception and cremation of the bodies of the dead, and the disposition of the ashes thereof. And until it is manifest that no change can be effected through appropriate corporate action, there is no occasion to determine whether the present by-law is so unreasonable and oppressive as to be invalid. See *Saltman v. Nesson*, 201 Mass. 534, 541.

The demurrer, however, being a single demurrer to the whole bill, must be overruled. *Sears v. Trowbridge*, 15 Gray, 184. *York v. Johnson*, 116 Mass. 482. 1 Danl. Ch. Pl. & Pr. (5th Am. ed.) 597. *Emans v. Emans*, 1 McCarter, 114. If injunctive relief is also necessary to protect the plaintiffs' property rights from further impairment until the account is stated, and the title to the stock alleged to have been fraudulently issued is determined, application may be made to a single justice.

By the terms of the reservation the case is to stand for hearing on the merits.

Decree accordingly.

PHILIP J. PHILBIN, administrator, *vs.* MARLBOROUGH ELECTRIC COMPANY.

Worcester. May 19, 1914. — June 17, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Negligence, Trespasser, In use of electricity. Tree.

If the son of the owner of certain land, while engaged in removing browntail moth's nests from a tree on the land, reaches with a pole across the boundary of the land to cut off a nest on a bough of the tree which overhangs land of an adjoining owner, he is not a trespasser, and if, while he is in the exercise of due care, the pole comes in contact with an uninsulated wire carrying a current of electricity of dangerous voltage negligently permitted by an electric power company to pass through the branches of the tree, and he is killed, an action may be maintained by the administrator of his estate against the company for causing his death.

In an action by an administrator against an electric power company to recover for the death of the plaintiff's intestate, who was killed while removing browntail moth's nests from a tree on his father's land, by a pole which he was using coming in contact with wires of the defendant on adjoining land, there was evidence tending to show that the plaintiff's intestate was standing on a large branch in the tree and near its trunk, that the pole was long, shod with metal and furnished with a metal cutter from which a wire ran to a handle by which he operated it; that the line of wires maintained by the defendant carried a current of thirteen thousand volts, which was extremely dangerous to life, that the wire nearest the tree was not insulated, that the ends of the branches of the tree were moist with melted and unmelted snow, that a current of electricity passed from the uninsulated wire through the ends of the branches of the tree to the intestate, giving him a shock which caused him to give a jerk to the pole, so that it either moved or fell and came into direct contact with the defendant's wire, the full current from which then passed into and through the intestate's body, killing him. *Held*, that findings were warranted that the intestate was in the exercise of due care and that the defendant was negligent in the manner in which it maintained its wire.

It seems that the branches of a tree that overhang the land of a person other than the owner of the land in which the tree is growing may be cut off by such other owner to the extent that they overhang his land, but that, if he does not exercise this right, the product of the branches belongs to the owner of the trunk of the tree, who also must keep such branches from creating a nuisance.

TORT by the administrator of the estate of Thomas G. O'Donnell, for causing the death of the plaintiff's intestate as stated in the opinion. Writ dated February 21, 1912.

In the Superior Court the case was tried before *Aiken*, C. J. At the close of the evidence, it was agreed that a verdict should be ordered for the plaintiff for \$2,500, and that the case should be reported to this court for determination, judgment to be entered for the plaintiff on the verdict without interest and without costs, if in the opinion of the court there was upon the legally admissible evidence an issue for the jury of the due care of the plaintiff's intestate and of the negligence of the defendant; otherwise, judgment to be entered for the defendant, without costs.

The case was submitted on briefs.

W. G. Thompson & R. Spring, for the defendant.

H. Parker, G. E. O'Toole & G. A. Parker, for the plaintiff.

SHELDON, J. The only question presented to us is whether there was upon the legally admissible evidence an issue for the jury of the due care of the plaintiff's intestate and of the negligence of the defendant.

The jury could find the following facts: The intestate was engaged under the direction of his father in removing browntail moths' nests from a tree upon his father's land. He was standing in the tree, near its trunk, on a large branch. A little outside of this land, the defendant maintained a line of wires carrying currents of electricity near to and through the ends of the branches of the tree, these branches overhanging the adjoining land. The wires carried electricity of a very high voltage, to wit, a circuit of thirteen thousand volts, which was extremely dangerous to life. One at least of these wires, that nearest to the tree in which the intestate was at work, was uninsulated. A current of electricity escaped from this wire into the ends of the branches of the tree, which were moist with melted and unmelted snow, passed to the intestate where he was standing and gave him a shock. The effect of this was to give a jerk to the pole which he had in his hands, by means of which he was clipping off the moths' nests at the ends of the branches. This caused the end of the pole, shod with metal and furnished with a metal cutter from which a wire ran to the handle by which the intestate operated it, to move or fall so as to come into contact with the wire. Immediately the current of thirteen thousand volts passed through the pole or the wire into and through the intestate's body, causing his death.

The intestate was not a trespasser, even if he did reach out his pole beyond the boundary of his father's land, to cut off moths' nests at the end of a branch. He was doing the work under the direction and in the right of his father, who was required by law to remove the moths' nests from the tree. Sts. 1905, c. 381, §§ 1, 6; 1906, c. 268, § 4; 1908, c. 591, § 2. See also Sts. 1907, c. 521; 1909, c. 263; and 1910, c. 150. The whole of the tree, including the branches which overhung the adjoining land, was the property of the intestate's father, even though the adjoining owner might have lopped off such branches to the extent that they overhung his property. Unless the adjoining owner did this, it was the father's duty to remove the nests from such overhanging branches, and thus abate what the statutes above referred to had declared to be a nuisance, just as he would be entitled to the acorns or other fruit that grew thereon. See the cases collected in 1 Cyc. 791, *et seq.*, and 28 Am. & Eng. Encyc. of Law, (2d ed.) 539. The case at bar as to this comes under the rule that was applied in *Parker v. Barnard*, 135 Mass. 116; *Proctor v. Adams*, 113 Mass. 376; and *Winslow v. Gifford*, 6 Cush. 327.

The intestate was engaged in lawful work, in a place where he had a right to be, and was carrying on his work in the usual manner. It does not appear that he had notice or knowledge of the danger to which he was exposed in consequence of what the defendant had done. There was sufficient evidence of what his conduct was to take the case out of the range of mere conjecture, and we need not consider such cases as *French v. Sabin*, 202 Mass. 240; *Hamma v. Haverhill Gas Light Co.* 203 Mass. 572; *Lydon v. Edison Electric Illuminating Co.* 209 Mass. 529; and *Ridge v. Boston Elevated Railway*, 213 Mass. 460. It could be found that he was in the exercise of due care. *McCrea v. Beverly Gas & Electric Co.* 216 Mass. 495.

There was evidence also of the defendant's negligence, even if its act in putting its wires in this place was not a mere trespass. It placed its wire, uninsulated and carrying a current of thirteen thousand volts, in such close proximity to these branches as to create a danger of electricity passing on to them whenever they were moistened with snow or rain, as they were liable to be at any time. It knew, or must be presumed to have known, of the statutes above referred to and of the danger of just such an acci-

dent as did happen. A jury well could say that its conduct was negligent. That similar wires carrying similar currents are not insulated elsewhere, or that the cost of insulation would have involved greater expense in the transmission of power, is not decisive in the defendant's favor. The safety of human life does not necessarily yield to the desirability of furnishing light or power as cheaply as may be to the users thereof. Here also the principle is settled against the defendant by the case of *McCrea v. Beverly Gas & Electric Co.*, *ubi supra*.

The evidence to the admission of which the defendant excepted was competent upon these issues. We have stated already the findings which could have been made thereon.

In accordance with the stipulation of the report, judgment must be entered for the plaintiff in the sum of \$2,500.

So ordered.

ISAAC WEIL, executor, *vs.* BOSTON ELEVATED RAILWAY
COMPANY.

SAME *vs.* SAME.

Norfolk. May 19, 1914. — June 17, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Practice, Civil, Report, Opening statement to jury, New trial. *Negligence*, Street railway.

The question, whether, after a verdict for the defendant in an action at law, it was proper to grant a motion of the plaintiff for a new trial on the ground that rulings of the trial judge, refusing to permit the plaintiff to present certain contentions to the jury and to rule that such contentions were open to the plaintiff on the pleadings and the evidence, were erroneous, properly may be presented to this court by a report of the trial judge, in which he certifies that he is of the opinion that such question should be determined before further proceedings in the case.

Although, where the declaration in an action of tort against a street railway company for the conscious suffering and death of a passenger in 1908 alleges that the decedent was caused to fall, as he was alighting from an open street car of the defendant, by "gross negligence" of the servants and agents of the defendant in the manner in which they "started, stopped and operated" the car, the plaintiff's counsel in his opening statement to the jury rests the right of recov-

ery on a negligent starting of the car as the decedent was in the act of alighting when the car was at a standstill, if the evidence warrants findings that, while the car was coming to a stop at a regular stopping place and the decedent was stepping to the running board in the act of alighting and was in the exercise of due care, the car suddenly resumed its speed by reason of negligence of the defendant's employees, the word "gross" in the declaration may be disregarded, and the plaintiff is not precluded, by the opening statement of his counsel to the jury, from having the jury pass upon all the issues raised by the pleadings.

At the trial together of two actions against a street railway company, one for the conscious suffering and the other for the death of a passenger who, while alighting from an open street car of the defendant in 1908, was caused to fall to the ground when it suddenly was started, there was evidence which warranted findings that the car was equipped with a system of electric push buttons and bells for the use of passengers in signalling for it to stop, that the decedent, desiring to alight, pressed one of the buttons, that the conductor, hearing the signal, gave a signal by a bell operated by a strap to the motorman, who slackened the speed of the car, bringing it either to a full stop or nearly so at a place designated by the defendant as a regular stopping place for boarding or leaving the car, that the decedent was stepping to the running board of the car when, without any warning being given, the car unexpectedly resumed its speed, throwing the decedent to the ground. *Held*, that there was evidence of negligence on the part either of the motorman or of the conductor.

If an open electric street railway car has come nearly to a stop at a place where passengers generally may be expected to alight, it is negligence on the part of the persons in charge of the car, although they may not have seen any signal by a passenger desiring to alight, to cause the car suddenly to go forward at an accelerated speed without taking precautions to ascertain whether passengers are preparing to alight by stepping to the running board.

If a street railway company equips an open electric car with a system of push buttons and bells operated by electric batteries for the use of passengers in signalling for the stopping of the car, and the system frequently becomes unworkable by reason of exhaustion of the batteries, it is a duty of the company, which it cannot avoid by delegation to others, to keep the system in working order or properly to notify passengers of its disuse, and if a passenger on a car with such a system which is not in working order, not knowing the system to be out of order and relying upon its being in good condition, pushes a button to signal for the stopping of the car, hears a strap bell signal given to the motorman for the stopping of the car and thinks it is in response to the signal he has given, and, as the car slackens its speed and comes nearly to a stop at a regular stopping place, steps upon the running board to alight, from which he is thrown to the ground by a resumption of accelerated speed by the car and receives injuries which result in his conscious suffering and death, such injuries may be found to have been caused, by negligence of the company in not performing its duty as to the system of push buttons and bells.

Where the judge presiding at the trial of an action of law, by refusing, subject to exception by the plaintiff, to permit the plaintiff to present to the jury certain contentions which were open to him upon the pleadings and the evidence, and by refusing to give certain rulings of law, unduly narrows the issues to be pre-

sented to the jury, who find for the defendant, the plaintiff not only may present his contentions to this court by a bill of exceptions, but also may present them to the trial judge as the basis of a motion for a new trial.

TWO ACTIONS OF TORT, the first for conscious suffering and the second for causing the death of Hannah Levy, the plaintiff's testatrix, who was alleged to have been thrown to the ground as she was alighting from an open street railway car of the defendant on August 1, 1908, by reason of "gross negligence" of the defendant's servants and agents in the manner in which they "started, stopped and operated" the car. Writs dated September 15, 1908.

In the Superior Court the cases were tried together before *Aiken*, C. J. In his opening statement to the jury, counsel for the plaintiff stated that the deceased, while a passenger on one of the defendant's open cars on Beacon Street, Boston, travelling toward Boston from Brookline and bound to a point near the corner of Maitland and Beacon streets, signalled for the car to stop just before the car reached Maitland Street by pressing an electric push button on the stanchion of her seat; that she thereupon heard a bell ring at the front of the car; that the car immediately began to slow down and stopped at the usual stopping place, and that, just as the plaintiff's testatrix was about to step from the running board of the car to the ground, the car started up again, throwing her to the ground.

Material facts which the evidence tended to prove are stated in the opinion.

At the close of the evidence and before the charge to the jury, the plaintiff's counsel stated to the Chief Justice that the plaintiff contended, and requested to be permitted "to argue to the jury that, even if the car had not come to a full stop, yet if the plaintiff's testatrix was injured by its being carelessly started up while she was alighting, it is a question of fact for the jury whether under all the evidence she was in the exercise of due care and entitled to recover;" also that the plaintiff contended, and desired to argue, "that the plaintiff is not necessarily bound to establish that the car came to a full stop before the deceased alighted;" also that the plaintiff contended and requested to be permitted "to argue to the jury that if the deceased pushed the electric button in ignorance of the fact that it was not working and heard

a bell ring at the front of the car and the car came so nearly to a stop at a regular stopping point that she could reasonably and prudently step off, and she believed that the car was stopping in response to her signal, and stepped off, and at the same instant the motorman, without any signal from the conductor and without looking to see whether any one was getting off, started up the car and this threw the deceased to the ground and was the immediate and direct cause of her death, the plaintiff, if otherwise entitled to recover, would not be precluded therefrom by the fact that the car had not come to a full stop."

The Chief Justice, subject to exceptions by the plaintiff, refused to permit the plaintiff's counsel to argue as he requested, and also refused requests for rulings based on the contentions he stated, and instructed the jury that, if the plaintiff's testatrix was attempting to alight from the car before it had come to a stop, the plaintiff could not recover.

The jury found for the defendant in both cases. The plaintiff thereupon moved for a new trial of the cases, and, subject to exceptions by the defendant, the Chief Justice granted the motion, making the following statement in his order: "In the submission of the above named cases to the jury, I so narrowed the issue that the plaintiff was deprived of opportunity to have the jury pass upon aspects of the case which in my opinion were open on the pleadings and the evidence."

Thereafter exceptions were filed, presented to this court and dismissed, by a decision reported in 216 Mass. 545, on the ground that they were presented prematurely.

Thereafter the Chief Justice reported to this court for determination the questions of law presented by the order setting aside the verdicts and by the rulings made in connection with the order and by the other rulings of law in the cases, as shown in the record, stating that he was of the opinion that they ought to be determined before any further proceedings in the Superior Court, and that all further proceedings in the Superior Court except such as were necessary to preserve the rights of the parties ought to be stayed until they were determined.

The cases were submitted on briefs.

W. G. Thompson & G. E. Mears, for the defendant.

E. F. McClennen & J. J. Kaplan, for the plaintiff.

BRALEY, J. The first and decisive question for decision is, whether after verdicts for the defendant the ruling of law granting new trials on the plaintiff's motions, because the issue was so narrowed in the instructions "that the plaintiff was deprived of opportunity to have the jury pass upon aspects of the case which . . . were open on the pleadings and the evidence," was erroneous. If the ruling is right the plaintiff's exceptions taken to rulings during the trial become immaterial. The rights of the defendant also are fully protected. The ruling made as the basis for the action of the Chief Justice of the Superior Court, while reviewable on the exceptions taken by the defendant, who for the first time became the party aggrieved, is open on the report, although the exceptions would not be ripe for entry in this court until the case had been finally disposed of in the trial court. *Shanahan v. Boston & Northern Street Railway*, 193 Mass. 412. *Loveland v. Rand*, 200 Mass. 142. *Brooks v. Shaw*, 197 Mass. 376, 378, 379, and cases cited. R. L. c. 173, § 105. *Foote v. Cotting*, 195 Mass. 55, 64.

The actions are tort for personal injuries causing the conscious suffering and death of the plaintiff's testatrix while a passenger on one of the defendant's open cars. It is alleged in the declarations, that her injuries and death were caused by the gross negligence of the defendant's servants through the manner in which they "started, stopped and operated" the car. The word "gross" may be disregarded, leaving the allegations sufficiently full and inclusive to permit proof on either ground of their negligent conduct in the management of the car. *French v. Lawrence*, 190 Mass. 230, 232. St. 1907, c. 392. *Cooney v. Commonwealth Avenue Street Railway*, 196 Mass. 11, 16, and cases cited. And although the counsel for the plaintiff in opening rested the right of recovery on the negligent starting of the car as the decedent was in the act of alighting, his statement did not preclude the plaintiff from fully presenting, and having the jury pass upon all issues of fact raised by the pleadings. *Minchin v. Minchin*, 157 Mass. 265. It is only where the facts which the plaintiff proposes to prove fail as stated in the opening to bring the case within the declaration, that the defendant properly may ask that a verdict be ordered for him. *Hey v. Prime*, 197 Mass. 474, 475. *Lee v. Blodget*, 214 Mass. 374, 377.

It is unnecessary to recite at length the voluminous testimony.

The jury upon the conflicting and irreconcilable statements of the witnesses would have been justified in finding, that, the car having been equipped with a system of electric push buttons for the use of passengers, the decedent, desiring to alight, pressed a button on the stanchion of her seat. The signal being heard by the conductor, he rang the strap bell in the motorman's end of the car. Thereupon the motorman in response slackened speed, bringing the car either to a full stop, or nearly to a full stop at a place designated by the company for passengers to board or leave the car, and as the decedent using due care was stepping to the running board, the car, without any warning being given, unexpectedly resumed its speed, throwing her to the ground. The jury had the right to say on the testimony of even one witness that the bell had been rung by the conductor, and not by a volunteer without the knowledge of the conductor. *Killam v. Wellesley & Boston Street Railway*, 214 Mass. 283. If not satisfactorily explained, these facts were evidence of negligence on the part of either the conductor or the motorman. *Lucarelli v. Boston Elevated Railway*, 213 Mass. 454. *Vine v. Berkshire Street Railway*, 212 Mass. 580. *Killam v. Wellesley & Boston Street Railway*, 214 Mass. 283. *Gray v. Boston Elevated Railway*, 215 Mass. 143.

But even if the position or conduct of the decedent indicating her desire and purpose to alight was not directly noticed by the conductor or the motorman, the jury could find that the car had been almost stopped where passengers generally might be expected to depart, and suddenly to go on at accelerated speed, without taking due precautions to ascertain whether passengers intending to get off and relying on the implied invitation were preparing to alight by stepping to the running board, also was evidence of negligence. *Hill v. West End Street Railway*, 158 Mass. 458. *Lacour v. Springfield Street Railway*, 200 Mass. 34. *Nolan v. Newton Street Railway*, 206 Mass. 384.

It is furthermore plain, that, if the jury believed the evidence of the motorman and of the defendant's foreman, the system of push buttons had become unworkable by reason of the exhaustion of the batteries. The evidence shows, that the batteries frequently ran down, and that the conductor or motorman could have ascertained whether they were usable, but that neither made any investigation or informed passengers that the signal could not be given.

It is not an excuse, that the duty of inspection of the batteries after a car had been run three hundred miles which covered a period of three or not exceeding four days' service, had been delegated to other employees. The car as equipped was a regular and not a special car. It had been sent out as providing to the public a safe mode of conveyance. It was to be "operated" by the motorman and conductor to whom its management had been entrusted. The proper discharge of their several duties comprised a reasonable supervision of all instrumentalities furnished for the use and convenience of passengers to enable them to give notice whenever they wished to terminate the transit at a regular stopping place. The jury accordingly would have been warranted in finding further from the length of time during which the conductor and motorman had been in charge of the car on the day of the accident and before its occurrence, that the defendant's employees in the discharge of their respective functions should have been aware of the breakdown of the apparatus, and, if upon examination the defect could not be remedied by them, they should have taken suitable measures for the protection of passengers who through ignorance of what had taken place might be misled to their harm. Indeed the motorman testified, that in the absence of any rule of the company to the contrary, if he heard the push button signal when the car was approaching an ordinary stopping place, he sometimes stopped the car even if he "got no bell from the conductor." The decedent is not shown to have had any knowledge of this defective condition, and if the jury were satisfied that in reliance upon the attempted signal, and induced by the belief when the strap bell rang that the signal had been recognized, she left her seat while the car was barely moving, approached the side of the car, and prepared to step to the running board, there was evidence for their consideration that the negligent failure of the conductor or motorman to ascertain whether the push buttons were in working order was the efficient cause of the accident. *Doe v. Boston & Worcester Street Railway*, 195 Mass. 168, 171, 172, and cases cited. *McGarry v. Boston Elevated Railway*, 195 Mass. 538, 540.

The plaintiff having been entitled to go to the jury upon all the grounds of alleged liability shown by the evidence, the ruling at the trial, that he could not recover under the pleadings and the

opening unless the car had come to a full stop and then was started before the decedent had a reasonable opportunity to depart, unduly restricted his rights.

While the plaintiff might have resorted to his exceptions for the rectification of this error, he also could move for a new trial because of a misdirection in law. R. L. c. 173, § 112. *Anthony v. Travis*, 148 Mass. 53, 57. *Nagle v. Laxton*, 191 Mass. 402, 403.

It follows that by the terms of the report the order granting the motions is to stand, and there is to be a new trial in each case.
So ordered.

ARTHUR HOWARD'S CASE.

Suffolk. May 19, 1914. — June 17, 1914.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DE COURCY, JJ.

Workmen's Compensation Act. Tree Warden.

Under St. 1911, c. 751, Part V, § 2, which provides that the word "employee" as used in the workmen's compensation act "shall include every person in the service of another under any contract of hire, express or implied, oral or written, except one whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of his employer," one who was employed as a tree trimmer by an electric lighting company, which employed men to trim trees to keep its wires clear, and was injured by falling from a tree into which he had been sent by the authorized order of a foreman of the company for the purpose of cutting off some dead branches, may be found by the Industrial Accident Board to have been an employee of the company at the time of his injury, although the foreman, whose order he was obeying, also was the tree warden of the town in which the accident occurred, no wires of the company ran through the branches of the tree, and the foreman had procured from the company authority to cut off the dead branches because he thought they were dangerous to the public.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board.

The case was heard by *Jenney, J.* The case had been presented to the Industrial Accident Board upon an agreed statement of facts substantially as follows:

The employee, Arthur Howard, was injured on August 1, 1912. He had been employed since July 22, 1912, by the Edison Electric Illuminating Company of Brockton, and his employment was as a tree trimmer for the company. The foreman of this work for the Edison Company was one Kennedy. On the morning of August 1, 1912, the trees on which trimming was to be done were wet because of a heavy rain the night before. On that morning, Howard got the team in which the tree trimmers went around to their work, and went to Kennedy's house and got Kennedy. While they were waiting to begin work another tree trimmer employed by the Edison Company, one Osborne, joined them. Rain then began again. When the rain had ceased, Kennedy, Howard and the other men drove off, following the lines of the Edison Company and inspecting the lines, and did no trimming. After going to the end of the line, they came back to the corner of School and Canton Streets in the town of Stoughton. Kennedy then said that there were some dead limbs upon a tree standing inside the sidewalk on the lawn of the Catholic Church. There were no wires of the Edison Company through the tree or on that side of the street. Kennedy told the men to climb the tree and lop off these dead limbs. One of the men took a ladder belonging to the Edison Company and placed it against the tree. Howard with two of the other men ascended the tree. While they were engaged in the work of lopping off the limbs, Howard slipped and fell from the tree and was injured. This injury totally incapacitated him for work.

The purpose of the Edison Company in employing men to trim trees was to keep its wires clear. The Edison Company had been in the habit of employing the tree warden of the town of Stoughton as the foreman over its gang of tree trimmers, because the company was not allowed to trim any shade trees in the town unless the tree warden was there to supervise such trimming. The company was obliged to do this trimming at least once a year to keep its wires clear.

The tree warden of the town of Stoughton is elected. Kennedy, mentioned above, had held the office for about twelve years. From two to five years he had been supervising the trimming work of the Edison Company. While supervising this work Kennedy was an employee of the company and acted as the fore-

man in charge of the company's men who were engaged in trimming trees. The Edison Company paid Kennedy \$3 a day. The Edison Company did not employ Kennedy as tree warden, but they did employ him because he was tree warden. Kennedy did not hire or discharge the men who worked under him but supervised the work, saw that it was done properly and to his satisfaction, and the Edison Company looked to him to see that the men were kept working. Kennedy reported to one Mattau, the company's superintendent, any man who was not satisfactory.

Howard had worked for Kennedy off and on for three or four years in Kennedy's official capacity as tree warden. Kennedy introduced Howard to Mattau as a good man who had worked for him several years, off and on. On July 22, Mattau, acting on behalf of the company, engaged Howard to work for the Edison Company. At that time, Mattau told Howard to go with Kennedy and do what Kennedy told him to do.

Howard was hired by Mattau, acting for the Edison Company, could have been discharged by him, and received his pay from the company. Neither Kennedy nor Howard was paid or expected to be paid by the town of Stoughton for the work they were doing on the day of the accident.

Kennedy's duty, while engaged in the work of the Edison Company, was to trim trees through which their wires ran. Howard's duty, while engaged in the work of the Edison Company, was to obey Kennedy's orders.

While Kennedy was engaged in trimming the tree on the lawn of the church where Howard was injured, he was not doing it for the benefit of the Edison Company, but because he thought the dead limbs were dangerous. A day or two before the accident Kennedy had told Mattau, that there were one or two dead limbs on a tree near the church which he would like to have cut off when the men got around there. Mattau said, "Go ahead and do it." The tree referred to was the tree from which Howard fell, and the limbs were those which he was removing when he fell. Mattau testified that he gave this permission as superintendent with the backing of the company. Kennedy testified that when he ordered the men to go up the tree he gave the order as an employee of the Edison Company.

He further testified that he did not think he gave orders to Howard in particular as distinguished from the other men, to go up the tree, but that he did not remember. Howard testified that Kennedy gave the order to trim the tree to the whole gang of tree trimmers and that he believed that he had to obey Kennedy's orders or "get through." Howard further testified that Kennedy said to him, "You take one side of the tree, and I'll take the other."

Howard's average weekly wages were \$12. The Industrial Accident Board found the foregoing facts. They further found that Howard received an injury arising out of and in the course of his employment on August 1, 1912; that at the time of the injury he was an employee of the Edison Electric Illuminating Company, insured by the Massachusetts Employees Insurance Association; and that he, therefore, was entitled to reasonable medical and surgical attendance from August 1, the date of the injury, up to and including August 14, and to compensation from August 15, 1912 to April 2, 1914, that is for eighty-five weeks, at the rate of \$6 a week, being half his average weekly wages, amounting to \$510, such compensation to be continued during his incapacity for work in accordance with the provisions of the act.

The judge made a decree affirming the decision of the Industrial Accident Board; and the insurer appealed.

The case was submitted on briefs.

S. H. Pillsbury & H. C. Tuttle, for the insurer.

A. K. Reading, H. T. Patten & E. A. Marden, for the employee.

HAMMOND, J. Upon this statement of agreed facts the Industrial Accident Board might have found that Howard, the employee, received his injury while engaged in trimming a tree; that in this trimming he was acting under the order of Kennedy; that Kennedy in giving the order was acting under the order of Mattau, the superintendent of the electric company, and that Mattau was acting as such superintendent in giving the order "with the backing of the company," or in other words that at the time Howard received his injury he was acting in obedience to the order of the electric company given to him through Mattau and Kennedy, its duly authorized officers or agents; that the town of Stoughton was in no way engaged in this work, that there was

no "lending" of Howard to the town by the company, and that Howard when hurt was doing work as an employee of the company and that he so supposed.

The insurer contends that, even if Howard was acting as an employee of the company, still the business of trimming this tree was casual and not in the usual line of his work. In support of this it is urged that he was employed as a tree trimmer of the company; that the purpose of the company in employing men to trim trees "was to keep its wires clear," and that the company had no interest in trimming trees except those through which its wires were run.

By St. 1911, c. 751, Part V, § 2, the statute under which the compensation is claimed, the word employee is defined to "include every person in the service of another under any contract of hire, express or implied, oral or written, except one whose employment is but casual, or is not in the usual course of the trade, business, profession or occupation of his employer." In the present case Howard was employed to trim trees and was to receive his orders from the company through Kennedy. It was no part of his business to inquire into the right of the company to trim any particular tree. He was to receive his orders from Kennedy and to obey them. At the time he was hurt he was doing what he had been hired to do. The work was not casual.

Nor was it outside the "usual course of the trade, business, profession or occupation" of the company. These words in the statute must be construed reasonably, and we are of opinion that they should be held inapplicable to a case like this, where the employee is engaged in the business for which he was hired and has no reason to think there is any change in the business, and where there is no change of employer.

Decree affirmed.

MICHAEL McDONOUGH vs. EMMA S. ALMY.

Essex. May 20, 1914. — June 17, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Contract, Performance and breach. Words, "Stationary steam engine."

If one contracts with a landowner to remove a ledge of rock to a certain level and for the purpose of the work proceeds to erect a stationary steam engine at a certain place within five hundred feet from dwelling houses, which by a city ordinance cannot be operated lawfully without a license from the board of aldermen, and his application for such a license is refused, the refusal of the license does not excuse him from the performance of his agreement, if he can perform it in a lawful manner by doing the work at somewhat less advantage in another place where he can make use of a license to erect a stationary engine already granted to the landowner.

A steam engine to be used for the purpose of removing a portion of a ledge of rock, which is set upon a concrete foundation and bolted and braced to the concrete in such a manner as to be immovable and free from vibration and which would be used in the same place for a period of at least two or three years, is a "stationary steam engine" within the meaning of a city ordinance, which provides that such an engine shall not be erected or put up within five hundred feet of a dwelling house or a public building without a license from the board of aldermen.

CONTRACT, with two counts, the first for the alleged breach of a contract in writing, which is described in the opinion, and the second on an account annexed. Writ dated January 7, 1905.

In the Superior Court the case was tried before *Pratt, J.* The material evidence is described in the opinion. At the close of the evidence the plaintiff asked the judge to give to the jury the following instructions:

"2. That under the contract of March 14, 1904, the plaintiff had the right to perform his part of the contract by installing his machinery, drills, stone crusher and other machinery upon any part of the defendant's premises described in said contract, that he deemed advisable, and if the authorities of the city of Salem prohibited him from doing the work under the contract at the place so selected by him, and the defendant was unable to procure a license or permit for him to perform his work under the con-

tract, then the defendant is liable to the plaintiff for such damages as he suffered by reason of such interruption or refusal on the part of the authorities to permit him to perform his work under said contract.

"3. If in order to perform the contract, it was necessary that a permit or license from the authorities of the city of Salem be issued before the plaintiff could perform said contract, and the defendant failed to obtain such necessary permit or license so that the plaintiff could not perform the work without violating the ordinances of the city of Salem, then such failure of the defendant would constitute a breach of the contract set forth in the first count of the plaintiff's declaration, and he would be entitled to recover such damages as he suffered by reason of such breach of the contract.

"4. The plaintiff was entitled to perform his part of the contract by commencing operations on any part of said premises where in his judgment it was proper to commence, and if a license or permit was necessary from the authorities of the city of Salem, then it was the duty of the defendant to procure said license or permit, and her failure so to do, if it resulted in preventing the plaintiff from continuing his work at such place so selected, would constitute a breach of said contract, and would entitle the plaintiff to damages for such breach.

"5. The defendant did not have the right under the contract to require the plaintiff to commence his operations at a place on the premises which was less convenient, less practical and more expensive to the plaintiff to perform his contract, than at some other place on the premises, and her demand on the plaintiff to do so would constitute a breach of her contract, and the plaintiff would be entitled to recover therefor under the first count of his declaration.

"6. If the defendant saw the plaintiff after the execution of the contract setting up his plant and made no objections thereto, then she would be estopped from claiming that the plaintiff should set up his plant on the Cliff Street side of the ledge.

"7. The act of the defendant on May 12, 1904, in applying for permission to put up for use and maintain a portable steam engine and boiler upon different portions of her land described in the contract, for the purpose of operating a stone crushing

plant, was in and of itself some evidence of an admission by the defendant of the right of the plaintiff to maintain his plant on Y Street, or any other part of the plaintiff's premises.

"8. Where a contract is silent or ambiguous with reference to any particular act or thing to be done by the parties thereto the jury have the right to consider, in determining what the contract was, the acts and declarations of the parties themselves, as bearing upon the proper determination of what the contract was between the parties.

"9. The notice by the defendant to the plaintiff that her application for a permit or license had been denied, and that he would have to stop working, constituted in law a justification for the plaintiff ceasing said operations, and he was justified after a reasonable time being given to the defendant to obtain said permission, to consider said contract broken by the defendant, and this entitled him to damages under the first count of the declaration.

"10. The plaintiff could not be required by the defendant to perform his contract, if such performance would constitute a breach of the law, and the defendant under the contract was bound to secure him the necessary permits in order to perform his contract, and failing so to do, is liable to the plaintiff for damages under the first count of the plaintiff's declaration.

"11. If the plaintiff waited from June until September for the defendant to obtain the necessary permits, and then notified her that he could not keep his plant there any longer, that in law would constitute a reasonable time to obtain the necessary permits, after which the plaintiff could consider the contract broken by the defendant, and he would be entitled to recover damages therefor under the first count of his declaration.

"12. If the defendant ordered the plaintiff to desist from operating his stone crushing plant on the Y Street side of said premises where it was installed, because the authorities of the city of Salem refused to grant a permit or license for its operation at that point, then that in law would be a breach of the contract by the defendant, and the plaintiff would be entitled to recover damages therefor under the first count of his declaration.

"13. If the defendant ordered the plaintiff to stop working the stone crushing plant after receipt of a notice to her from the

authorities of the city of Salem refusing her a permit or license to maintain a steam engine and boiler upon different portions of her land for the purpose of operating a stone crushing plant, and the plaintiff thereupon ceased his operations, such notice by the defendant to the plaintiff would be a breach of the contract, and entitle the plaintiff to damages under the first count of his declaration, and the refusal of the authorities of the city of Salem to grant such license or permit would not in law be a justification of the defendant for such a breach.

"14. If the defendant failed to provide for the contingency of the authorities of the city of Salem refusing to grant such permits as were necessary in order to enable the plaintiff to proceed lawfully with the performance of his contract, on any part of the defendant's land described in said contract, then the loss must fall upon her by reason of the happenings of such contingency, that is, her failure to obtain the necessary license or permits.

"15. The contract of the defendant was an unconditional promise to pay the contract price therein provided to the plaintiff, and if the plaintiff was prevented, either by the defendant, or by the city authorities from performing his contract, then he is entitled to recover damages for such prevention under the first count of his declaration.

"16. If the plaintiff was prevented from carrying out his part of the agreement of March 14, 1904, by a refusal of the authorities of the city of Salem to grant a permit or license, which was essential to its being lawfully carried out, the defendant, not having protected herself against such a contingency by some saving clause in her written contract, is not excused from the performance of the agreement, and is liable to the plaintiff in damages in like manner as if she herself had prevented the plaintiff from performing his agreement or had herself refused to perform it.

"17. If the authorities of the city of Salem refused to grant a permit or license, without which the plaintiff's stone crusher could not be lawfully operated in the place where he had set it up, that would constitute a breach of the defendant's contract, and entitle the plaintiff to damages under the first count of his declaration.

"18. The plaintiff had the right to set up and operate his stone crusher under the terms of the contract at any place on the premises described in the contract as he might choose, and the refusal

of the city authorities to permit him to operate at such place would constitute a breach of the defendant's contract, and entitle the plaintiff to damages under the first count of his declaration."

"20. The contract of March 14, 1904, was a binding contract upon both the plaintiff and defendant, and the defendant was bound under same to make all reasonable efforts to obtain orders for and to sell stone at fair market prices, and if she failed so to do, then the plaintiff would be entitled to damages for such breach.

"21. The defendant having bound herself by an absolute agreement for the performance of something not in itself unlawful, is not relieved from her obligation by the mere fact that in consequence of unforeseen circumstances, the performance of her contract has become unexpectedly burdensome, or even impossible, and the plaintiff is entitled to recover for such failure of the defendant to perform her part of the contract.

"22. Upon all the evidence, the steam boiler and steam engine set up by the plaintiff on the defendant's premises under the contract were not stationary, but were portable, and therefore no license was required to authorize the plaintiff to set up and use the same."

The judge refused to give any of these instructions, and gave, among other instructions, the following, which were requested by the defendant:

"16. Under the terms of the contract the defendant could require all the cellar stone procured in blasting of the size mentioned in the contract to be preserved and delivered by the plaintiff to whomsoever she might sell the same and could require that cellar stone should be the principal product produced, if in blasting it could be produced."

"25. That under the ordinance of the city of Salem in force in 1904, the plaintiff was required to apply and procure a license to blast.

"26. That the existence or non-existence of a license to blast is of no consequence in this case and the rights of the parties are in no way affected thereby."

"32. If the jury should find that the defendant knew that the plaintiff was erecting his plant on the Y Street side of the lot in a place where there was no license so to do and made no objection thereto, and permitted the plaintiff to proceed and thereafter the

city of Salem refused a license to operate the steam boiler and engine of the plaintiff at that place, and for that reason the operation at that place on the lot ceased; these facts would not excuse the plaintiff from proceeding on said lot to carry out his contract and if he refused to proceed, on the place on the lot where he lawfully could, that would constitute a breach of the contract on his part and he cannot recover."

The judge refused to make any of these rulings. On the first count of the declaration the jury returned a verdict for the defendant, and on the second count returned a verdict for the plaintiff in the sum of \$80.66. The plaintiff alleged exceptions, which after the death of *Pratt, J.*, were allowed by *Wait, J.*

The case was submitted on briefs.

J. H. Sisk, W. E. Sisk & R. L. Sisk, for the plaintiff.

E. R. Anderson & H. Guild, for the defendant.

CROSBY, J. The plaintiff's declaration contains two counts.

The first count alleges a breach of a written contract, and the second is a count upon an account annexed. There is no question between the parties as to the second count.

The written instrument annexed to the plaintiff's declaration constitutes a valid, legal contract, binding upon the parties. The defendant, being the owner of a certain parcel of land in Salem upon which there was a trap rock ledge which she desired to have removed to a certain level, entered into a contract with the plaintiff, by the terms whereof she agreed "to permit the said McDonough to go upon the said premises, put in derricks, crushers and other stone machinery, suitable to remove the said stone and in such form and at such times as the said Almy may direct." The contract also provides that the defendant is to "sell such stone and in such form as it may be needed and directed by her, and she agrees to pay to the said McDonough the sum of sixty-five cents per ton for crushed stone suitable for the market as ordered by her. And for all cellar stone that may be produced in blasting, she agrees to pay the said McDonough, when she directs the delivery thereof, at the rate of three cents a face foot in an eighteen inch wall. All other building stone she agrees to pay the said McDonough at the same rate last mentioned and under the same style of measurement." There are certain other provisions of the contract not material to the issues between the parties. This

contract appears to be clear and explicit in its terms and free from ambiguity. It does not in terms contain any agreement on the part of the defendant that she will furnish to the plaintiff or obtain for him any permit or license to enable him to operate a steam engine or boiler in the performance of his work, nor can any such undertaking on her part be reasonably inferred from the language employed. When the contract was entered into there was an ordinance in force in the city of Salem which provided that "No . . . stationary steam boiler from which power is to be taken or any other fuel than coal or coke is to be used to create steam and no stationary steam engine shall be hereafter erected or put up to be used in this city without a license obtained from the board of aldermen; provided however that no such license shall be required for such an engine unless the same is to be erected within five hundred feet of a dwelling house or a public building." The undisputed evidence shows that the plaintiff erected a boiler and engine upon the defendant's land within a distance of five hundred feet from dwelling houses, and without a license or permit therefor, and that thereafter he was prohibited by the city officials from operating it. The plaintiff contends that no license was required of him for the erection of such steam engine and boiler.

Having entered into the contract the plaintiff was bound to carry out the part of it which he had agreed to perform unless he was prevented or excused therefrom by the conduct of the defendant. He could not, however, violate the law or ordinances of the city of Salem in an attempt to perform the work undertaken, but was bound to its performance in a lawful manner. The contract is absolute in its terms and contains no condition that the plaintiff's obligations thereunder shall be dependent upon his being able to secure proper license to enable him to perform the work which he agrees to do. When the contract between the parties was entered into, the defendant held a license from the board of aldermen to erect and maintain an engine and boiler on Cliff Street, where the plaintiff could have carried on the work, even if not so advantageously as it could have been carried on had the plaintiff's plant been on the Y Street side; and no contention is made that the plaintiff could not have acted under the license so granted. The contract therefore could have been per-

formed by the plaintiff in such a manner as to violate no law, and he is bound by its terms. *Gaston v. Gordon*, 208 Mass. 265. If the plaintiff believed that he could erect and operate his engine and boiler without a license, even if such a license was required, or that no license was required under the ordinance, he could not be legally excused from the performance of his contract if he found that he was mistaken as to his rights, but was required to proceed to do the work at such a place on the lot as he might lawfully occupy for that purpose.

The plaintiff contends that the engine erected by him was not stationary but portable, and that therefore the ordinance did not apply. This contention brings us to the plaintiff's first exception, which is to the instruction of the presiding judge that the steam engine erected by the plaintiff was a "stationary steam engine" within the meaning of the ordinance. We are of opinion that this ruling was right. There is no controversy between the parties as to the manner in which the engine was installed or the length of time it would remain upon the defendant's land in the performance of the work. The evidence shows that it was set upon a concrete foundation and bolted and braced to the concrete in such a manner as to be stationary and immovable, and free from vibration. There was also evidence to show that it would be used in the same location for a period of at least two or three years. Whatever may have been the character of the engine when it was brought to the plaintiff's land, we have no doubt that when it was set upon the concrete foundation and permanently attached thereto for the purpose of being used two or three years, it became a "stationary steam engine" within the meaning of the ordinance. The word "stationary" is defined as "fixed in a certain station," "a steam engine permanently placed;" while "portable" accurately describes an object "capable of being borne or carried; easily transported." Webster's New International Dictionary. Accordingly the ruling that the engine was a "stationary steam engine," as that term was used in the ordinance, was correct, and the exception must be overruled.

After the contract was made, the plaintiff erected a steam engine and boiler, built bins and started to set up his stone crusher on the Y Street side of the lot. There was evidence to show that

before the plaintiff began work crushing stone he was informed that he could not run his stone crusher where it had been located; that he stated to the defendant that he had made a mistake in starting to work on the wrong side of the ledge, and that he asked her if she would try to get a permit or license so that he could work on the Y Street side; that in compliance with this request the defendant made application to the board of aldermen for a license to erect a steam engine and boiler upon different portions of the lot, and that after hearing this application was denied. The defendant testified that she told the plaintiff, before he had installed his engine and boiler on the Y Street side of the ledge, that she had no license to erect a steam engine and boiler there but did have a license to erect such engine and boiler on the Cliff Street side; that later he told her he was going to place his crusher on the Y Street side of the lot, and that she replied that if he put his crusher on that side of the ledge he did it upon his own responsibility, and that he must take all the responsibility and risk of loss; and that the plaintiff replied "I will." The plaintiff contended that stone could be taken from the ledge and crushed on the Y Street side at less expense than from the upper, or Cliff Street, side of the ledge. The defendant testified that after her application for a license had been denied by the board of aldermen, the plaintiff stated to her that he would not move his stone crusher and other machinery to Cliff Street because of the expense involved in such removal. The plaintiff testified that the defendant notified him, after the application for a license had been denied, that he must stop work, and that she thereby terminated the contract to his damage. This is the breach of the contract specified by the plaintiff. The defendant denied that she ever stopped the plaintiff from carrying out his contract, or interfered with its performance, aside from stating to him that if he undertook to operate his steam engine and stone crusher on the Y Street side of the lot he must take all the responsibility and risk of loss.

The judge correctly instructed the jury that if the defendant refused to permit the plaintiff to perform his contract and ordered him to stop work, that would amount to a breach of the contract on her part, and their verdict should be for the plaintiff on the first count. As the verdict was for the defendant on that count

the plaintiff must have failed to satisfy the jury that he was forbidden or prevented by the defendant from carrying out his contract. The case was referred to an auditor, who also found that the defendant did not unqualifiedly forbid the plaintiff to carry on his work.

The plaintiff excepted to the refusal of the judge to give twenty requests for instructions. The requests numbered 2, 3 and 4 could not have been given, as it was no part of the duty of the defendant to procure a license to enable the plaintiff to perform his work. The fifth request also could not have been given, because there is no evidence to warrant a finding that the defendant required the plaintiff to begin his operations at any particular place on the premises. The seventh request was rightly refused. If the defendant, at the plaintiff's request, saw fit to apply for a license so that the plaintiff could operate his stone crusher on the Y Street side of the ledge, it would not be an admission by her of the right of the plaintiff to operate his plant there or elsewhere. The eighth request was rightly denied, because the contract is not ambiguous in its terms. The ninth request assumes that the defendant notified the plaintiff that he would have to stop work. This was denied by the defendant and was the principal issue of fact between the parties to be determined by the jury under the first count and so could not have been given. The tenth and eleventh requests were rightly refused. The defendant was not bound, for the reasons previously stated, to secure permits to enable the plaintiff to perform his contract. The twelfth and thirteenth requests could not have been given because, if a license was refused to operate the plant on the Y Street side of the premises, the plaintiff might have operated it on Cliff Street or on any other part of the premises where a license could be obtained for that purpose, if such license was required. The fourteenth, fifteenth, sixteenth, seventeenth and eighteenth requests assumed that the defendant was bound to procure the necessary licenses to enable the plaintiff to perform his contract, but as no such obligation rested upon the defendant, these requests could not have been given. The twentieth request was rightly denied. As no appreciable amount of stone ever was quarried, there was no occasion to obtain orders to sell it; besides, this request relates to damages and, in view of the verdict of the jury, has become

immaterial. The twenty-first request was denied rightly. Whether the defendant failed to perform her part of the contract was a question for the jury upon conflicting evidence. The judge having correctly ruled as matter of law that the steam engine and boiler erected by the defendant were stationary, the twenty-second request was rightly refused.

The presiding judge gave four instructions to the jury at the request of the defendant, and the plaintiff excepted. The defendant's request numbered 16 was immaterial because there was no evidence to show that any cellar stone was procured or quarried by the plaintiff. The plaintiff therefore could not have been harmed by the instruction given. The defendant's requests numbered 25 and 26 would seem not to have been material to any issue in the case, and we do not think that the plaintiff was prejudiced thereby. If a license to blast was required in order that the plaintiff might legally perform his contract, it was his duty to obtain it for the same reason that it was his duty to obtain a license to erect a stationary steam boiler and engine. The exception to the giving of the defendant's request numbered 32 cannot be sustained. If the plaintiff could not obtain a license to operate on Y Street, he was not thereby excused from the performance of the contract, but was bound to carry on his work on such portion of the premises as he could occupy for that purpose.

It is plain that none of the plaintiff's exceptions can be sustained. The case seems to have been carefully tried by the judge of the Superior Court; his instructions were full, clear and accurate, and were well calculated to assist the jury in arriving at a correct conclusion.

Exceptions overruled.

JOHN D. BATCHELDER, trustee, vs. HOME NATIONAL BANK OF
MILFORD.

Suffolk. May 20, 1914. — June 17, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Bankruptcy, Unlawful preference. Evidence, Competency. Practice, Civil, Exceptions.

In an action by a trustee in bankruptcy against a bank to recover the amount of an alleged unlawful preference, if it appears that the bankrupt, who knew that his indebtedness greatly exceeded his assets, paid to the defendant the full amount of his notes held by it, none of which had become payable and two of which would not be payable until more than two months later, and there is evidence warranting a finding that he did this from a desire to stand well with the defendant so that he could borrow from it afterwards if he again should go into business, it can be found that the bankrupt intended to prefer the bank to his other creditors.

In an action by a trustee in bankruptcy against a bank to recover the amount of an alleged unlawful preference, there was evidence that the defendant's cashier was a friend of the bankrupt, whom he had known for many years, during which the bankrupt kept an account with the defendant, the average daily balance of which was about \$100, but without much balance on some days, that the defendant held notes of the bankrupt for \$1,000, which were renewals of notes that during two years had been renewed as fast as they came due, that the bankrupt had carried on a retail grocery business, that eleven days before the alleged preference his store was destroyed by fire and he ceased to make deposits with the defendant, that on the day of the fire he borrowed from the defendant the further sum of \$100 on a thirty day note with a responsible indorser, that on the day of the alleged preference he received \$2,500 from the insurance on his store, that the defendant knew from a statement given to it by the bankrupt two years before that he then owed \$4,300 on current bills and \$1,050 for borrowed money besides what he owed to the defendant, that when the defendant's cashier knew that the bankrupt was to receive the insurance money he had a talk with him about payment to the defendant of the notes for \$1,100 with a rebate for the interest not then accrued, that on a Saturday afternoon, after the defendant's closing hour, the bankrupt brought to it the check which he had received from the insurance company, that the defendant deducted from the amount of the check the amount of the bankrupt's notes held by it with a rebate for unaccrued interest and gave the bankrupt the balance in cash, and that the defendant entered the payment by the bankrupt on its books as made on the following Monday. *Held*, that this evidence warranted a finding that the defendant at the time of the payment had reasonable cause to believe that the bankrupt was insolvent and that he intended to prefer the defendant to his other creditors.

Where it appears by a bill of exceptions that a certain request for a ruling was refused in the terms asked for because the judge said that he had covered it in substance in his instructions to the jury, and the instructions given by the judge on this point are not stated, it must be assumed that they were correct and sufficient.

In an action by a trustee in bankruptcy to recover the amount of an alleged unlawful preference, although the bankrupt's schedule of his debts and assets filed in the bankruptcy proceedings is not admissible to show his insolvency at the time of the alleged preference, yet where the bankrupt has testified that his financial condition did not change materially from the time he made the payment alleged to be a preference to the time he filed the schedule, and the schedule then is admitted in evidence, against the defendant's exception, it may be considered that the schedule has been admitted as substantially embodying the testimony of the witness as to his financial condition when he made the payment alleged to constitute the preference, and under such circumstances justice does not require the sustaining of the exception and a new trial of the case for the correction of the formal error which cannot have affected injuriously the substantial rights of the parties within the meaning of St. 1913, c. 716, § 1.

CONTRACT by the trustee in bankruptcy of Jeremiah J. O'Neil to recover from the Home National Bank of Milford the amount of a preference alleged to have been made in violation of the bankruptcy act of 1898, § 60, as amended by U. S. St. 1903, c. 487, § 13. Writ dated January 21, 1910.

In the Superior Court the case was tried before *Morton, J.* The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to make various rulings, of which the first was, that upon all the evidence the plaintiff could not recover and the verdict must be for the defendant. The tenth ruling requested, referred to in the opinion, which the judge refused to make because he had covered it in substance, was as follows: "10. If the bankrupt, at the time he made payment of the notes, intended thereby to create a preference in favor of the indorsers on the notes, and the cashier of the bank to whom the payment was made had no knowledge, actual or constructive, of such intention, then you cannot find for the plaintiff as against this defendant."

The judge refused to order a verdict for the defendant and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of \$1,389.66. The defendant alleged exceptions.

The case was submitted on briefs.

W. Williams & S. D. Vincent, for the defendant.

J. T. Pugh, for the plaintiff.

SHELDON, J. The defendant's main contention is that there was no evidence to warrant a finding that O'Neil intended to give a preference to the defendant, or that the defendant had reasonable cause to believe that O'Neil was insolvent and intended to give to it a preference by paying the notes which it held.

There was evidence that O'Neil was insolvent. It could be found that his indebtedness greatly exceeded his assets, and that he knew this fact. He paid the defendant the full amount of his notes which it held, none of which had yet become payable, and two of which were not payable until more than two months later. He made the payment, the jury could find, from a desire to stand well with the defendant, so that he could borrow from it afterwards, if he again should go into business. The jury could find that the necessary effect of what he did was to prefer the bank, and could infer that this was his intention. *Hewitt v. Boston Straw Board Co.* 214 Mass. 260. *Wilson v. Mitchell-Woodbury Co.* 214 Mass. 514, and cases there cited.

It was a closer question whether the defendant had reasonable cause to believe that he then was insolvent and intended to prefer it to his other creditors. To hold the defendant there must have been a reasonable cause of belief, not a mere ground of suspicion. *Stuart v. Farmers Bank*, 137 Wis. 66. *Grant v. National Bank*, 97 U. S. 80. *Barbour v. Priest*, 103 U. S. 293. *Stucky v. Masonic Savings Bank*, 108 U. S. 74. On the other hand, it is equally true that this is a question of fact; that the inference of the fact may be drawn from circumstances; and that the same circumstances which to some minds would merely give ground for suspicion may afford also evidence which to other minds would carry conviction that they not only showed reasonable cause of belief, but actually had created a real belief. *Hewitt v. Boston Straw Board Co.* 214 Mass. 260. *Brown v. Pelonsky*, 210 Mass. 502. *Carroll v. Hayward*, 124 Mass. 120, 122. For these reasons, many of the decisions relied on by the defendant, in which the fact was determined by judges sitting without a jury, have no real bearing here.

There was evidence of the following facts: The defendant's cashier had known O'Neil for about twenty years and was quite

friendly with him. O'Neil had kept an account with the defendant for that time, with an average daily balance of about \$100, but without much balance on some days. He had owed the bank the amount of these notes (excepting the note for \$100) for nearly two years, they having been renewed as fast as they came due. He carried on a retail grocery business. On May 5, 1908, his store was burned out, causing a total loss, and he ceased to make deposits with the defendant. That afternoon he borrowed the further sum of \$100 on his thirty-day note with a responsible indorser. On May 16, he received about \$2,500 from the insurance on his store. Two years before this, according to his statement then given to the defendant, he owed \$4,300 in current bills, and \$1,050 on borrowed money. At this time he owed to the defendant, as the jury have found, \$1,100 in notes for borrowed money and was liable to it as indorser on another note for \$1000. When the defendant's cashier knew that O'Neil was about to receive the insurance money, he had a talk with O'Neil as to the payment of these notes for \$1,100 with a rebate of the interest not yet accrued. On Saturday afternoon, May 16, 1908, after the closing hour of the defendant, O'Neil brought in to it the check which he had just received from the insurance companies; the defendant deducted from this the amount of its notes with a rebate of interest, and gave him the balance in cash. The defendant entered this payment on its books as made on Monday, May 18.

The defendant offered explanations of some of these circumstances, and as to some there was a conflict of evidence. But this of course was for the jury.

The payment of the notes before they were due, the fact that the whole transaction was an unusual one, the desperate condition in which O'Neil's finances then were, the intimacy of the defendant's cashier and its directors with O'Neil as testified to by the cashier, the haste with which the transaction was carried through after the usual business hours of the defendant, the fact that it was entered upon the defendant's books only on the next secular day, and that the money paid to the defendant came from the only means that then practically was available to O'Neil, as the jury could find that the defendant knew,— all these circumstances warranted the jury in drawing the inference contended for by the plaintiff. *Killam v. Peirce*, 153 Mass. 502. *Jaquith*

v. *Winnisimmet National Bank*, 182 Mass. 53. *Brown v. Pelonsky*, 210 Mass. 502. *In re The Leader*, 190 Fed. Rep. 624, 629.

We have examined all the decisions to which we have been referred by the defendant's counsel, and have found nothing which leads us to doubt the soundness of our conclusion. The jury were warranted in finding that the defendant had reasonable cause to believe that O'Neil was insolvent and that he intended to prefer the defendant to his other creditors.

There was evidence that the \$100 note was held by the defendant and not by its cashier individually. O'Neil testified that he did not know that this loan was not made to him by the bank. Both the cashier and O'Neil testified that this note was included in the payment made by O'Neil to the bank on May 16.

It follows that the defendant's first request for instructions properly was refused. Its tenth request was refused in the terms asked for, because the judge said that he had covered it in substance. We are not informed what instructions were given upon the point, and must presume that they were correct and sufficient. *Townsend v. Niles*, 210 Mass. 524, 530. *Hubbard v. Allyn*, 200 Mass. 166, 172. As the matter of this request was covered, it must have been found that O'Neil intended to prefer the bank, and that the hypothesis stated in the request was not in fact true.

The schedules of O'Neil's assets and liabilities filed by him in the bankruptcy proceedings were not properly admissible. *Simpson v. Carleton*, 1 Allen, 109. *Hosmer v. Oldham*, 122 Mass. 551. But O'Neil testified that his condition had not materially changed from the time that he paid these notes to the time when he filed the schedules. They doubtless were admitted, as in *Atherton v. Emerson*, 199 Mass. 199, 210, as substantially embodying the testimony of the witness as to his financial condition when he paid the notes. That was material to be shown. Under such circumstances, justice does not require a new trial of the case for the correction of this formal error. It cannot have affected injuriously the rights of the defendant. St. 1913, c. 716, § 1. The case was tried in October, 1913, and the provisions of § 6 of the statute apply.

The other exceptions alleged in the bill have not been argued, and we treat them as waived.

Exceptions overruled.

BOSTON AND ROXBURY MILL CORPORATION vs. THEODORE H.
TYNDALE, public administrator.

Suffolk. May 22, 1914. — June 17, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Corporation, Dividends. Limitations, Statute of. Trust, What constitutes. Evidence, Presumptions and burden of proof. Practice, Civil, Agreed statement of facts.

Whether, as sometimes has been said in other jurisdictions, a stockholder in a corporation cannot maintain an action against the corporation for the amount of a dividend without a previous demand, and therefore the statute of limitations cannot begin to run upon a claim for a dividend until such a demand has been made, here was mentioned as a question which it was not necessary to determine in the present case.

Whether a corporation, which in compliance with an order of court has deposited the amount of certain unclaimed dividends in a separate fund apart from its other assets, holds the fund in trust for the payment of such dividends when properly claimed, so that, until the trust is repudiated or the right of a claimant is denied, the statute of limitations does not begin to run against such claimant, here was mentioned as a question which was not passed upon.

Under R. L. c. 202, § 10, if a person entitled to bring an action dies within the period fixed by the statute of limitations, the action, if it survives, may be brought by the administrator of his estate within two years after the administrator's giving bond for the discharge of his trust, although such administrator was not appointed until eighty-four years after the expiration of the original period of limitation.

Upon an agreed statement of facts, in which it is stated that a certain person disappeared in 1818 and never was heard of again although diligent inquiries were made, this court under St. 1913, c. 716, § 5, may draw the inference that he was dead in 1825 and consequently had died before February 14, 1831, when the six year period of limitation on his right to sue for a certain dividend expired.

BILL IN EQUITY, filed in the Supreme Judicial Court on September 18, 1912, by the Boston and Roxbury Mill Corporation, a corporation created by St. 1814, c. 39, amended by St. 1816, c. 40, and dissolved, except as to the disposition of the fund here in question, by a decree of the Supreme Judicial Court made on May 1, 1912, against Theodore H. Tyndale, as public administrator of the estate of Thomas M. Lloyd, who intervened at the request of the Attorney General, praying for an order of distribution of the fund of \$2,375 named below.

The bill was as follows:

"And now comes the Boston and Roxbury Mill Corporation and says that heretofore, to wit, on or about May 13, 1912, pursuant to an order of the court dated May 1, 1912, it has paid into the court the sum of \$2,434.19, being the aggregate amount of dividends accrued upon five shares of stock standing in the name of Thomas M. Lloyd, a stockholder of said company from the year 1818, to wit, \$2,375 plus interest allowed on said funds from February 1, 1911, by the bank where said funds have been deposited; that although it has made diligent search by advertisement and otherwise, it has been unable to ascertain the whereabouts of any heirs or representatives of said Lloyd; that said the Boston and Roxbury Mill Corporation is desirous of finally closing its affairs and making complete distribution of all its remaining moneys, including said amount so held in the hands of the court:

"Wherefore, said the Boston and Roxbury Mill Corporation prays that an order may be entered authorizing distribution of the amount so held by the court (\$2,375) among the present holders of the outstanding stock of said corporation (excepting said Lloyd, his executors, administrators and assigns, and excepting certain shares held in the treasury of said corporation) after such notice as the court may prescribe; and authorizing the return of said fund to the treasurer of said corporation for the purpose of such distribution; and for such other and further order in the premises as the court may deem wise."

The answer of the public administrator was as follows:

"Now comes Theodore H. Tyndale, public administrator for the said county of Suffolk, and says that on July 17, 1913, he was duly appointed public administrator of the estate of Thomas M. Lloyd, who was during his lifetime a stockholder in said corporation, and respectfully represents that, upon an exhibition of the record of his appointment, the court should order to be paid over to him the sum now in the hands of the clerk of said court under a prior decree made by the court in the above cause, with accumulated interest thereon, upon said public administrator's receipt therefor."

The case was submitted to *Rugg, C. J.*, upon an agreed statement of facts, including the facts which are stated in the opinion,

and was reserved by the Chief Justice for determination by the full court.

The case was submitted on briefs.

C. H. Tyler, B. Corneau & B. E. Eames, for the plaintiff.

T. H. Tyndale, public administrator, *pro se*.

SHELDON, J. It is contended by the plaintiff that the right to recover these dividends has been barred by the statute of limitations. There is a conflict of decisions upon the question whether that statute begins to run against a stockholder's right of action for dividends declared by a corporation as soon as these have been declared and become payable, or not until there has been a repudiation by the corporation of the stockholder's right to require payment of the dividends. The former view has been taken by the British courts and sometimes has been followed in this country. *In re Severn & Wye & Severn Bridge Railway*, [1896] 1 Ch. 559. *In re Artisans' Land & Mortgage Corp.* [1904] 1 Ch. 796. *Smith v. Cork & Bandon Railway*, Ir. R. 5 Eq. 65. *In re Drogheda Steamship Packet Co.* [1903] 1 Ir. R. 512, 514. *Winchester & Lexington Turnpike Co. v. Wickliffe*, 100 Ky. 531. *Redhead v. Iowa National Bank*, 127 Iowa, 572, 577.

The weight of authority in this country is in favor of the latter view. *Kane v. Bloodgood*, 7 Johns. Ch. 90, 122, 123. *Philadelphia, Wilmington & Baltimore Railroad v. Cowell*, 28 Penn. St. 329, 339. *Bank of Louisville v. Gray*, 84 Ky. 565, 575. *Armant v. New Orleans & Carrollton Railroad*, 41 La. Ann. 1020. See also *Tyson v. George's Creek Coal & Iron Co.* 115 Md. 564; *Kobogum v. Jackson Iron Co.* 76 Mich. 498; and *Bedford & Rutherford Counties v. Nashville, Chattanooga & St. Louis Railway*, 14 Lea, 525. This sometimes has been put on the ground that an action for the recovery of dividends cannot be maintained without a previous demand, and so that the statute cannot begin to run until such a demand has been made. *Hagar v. Union National Bank*, 63 Maine, 509, 512, 513. *Scott v. Central Railroad & Banking Co.* 52 Barb. 45. *State v. Baltimore & Ohio Railroad*, 6 Gill. 363, 387. As to this ground see *Whitney v. Cheshire Railroad*, 210 Mass. 263, 268, and *Pierce v. State National Bank*, 215 Mass. 18. But we do not need to pass upon this point.

Nor is it necessary for us to determine whether by reason of the action of the plaintiff in depositing the amount of these and other dividends in a separate fund apart from its other assets,

that fund became a special fund charged with the payment of the dividends so that a trust was created for their payment out of that fund, by reason of which the running of the statute of limitations would be prevented until there was a repudiation of the trust or a denial of the rights of the intestate thereunder. It was intimated in the leading English case that this might be so. *In re Severn & Wye & Severn Bridge Railway*, [1896] 1 Ch. 559. In this country it has been expressly so held. *Matter of Le Blanc*, 14 Hun, 8, and (on appeal) 75 N. Y. 598. That decision, though said to be a border case, was recognized as law in *People v. Merchants & Mechanics' Bank*, 78 N. Y. 269. See to the same effect *Le Roy v. Glove Ins. Co.* 2 Edw. Ch. 657; *Searles v. Gebbie*, 115 App. Div. (N. Y.) 778, affirmed in 190 N. Y. 533; *American Loan & Trust Co. v. Grand Rivers Co.* 159 Fed. Rep. 775.

Lloyd the intestate became the owner of this stock in 1818. Then he seems wholly to have disappeared. Nothing since has been heard of him, although diligent inquiries have been made, reaching back for many years succeeding the time when he became a stockholder. Dividend checks sent to him have failed of delivery. In 1843 the word "deceased" was written against his name on a list of stockholders among the papers of the petitioner. This did not purport to be a statement that he had then or recently died. It indicates that the officers of the petitioner either had then learned of his earlier death or had inferred it from the fact that he had been unheard of for nearly twenty-five years. A presumption of his death arose in 1825, seven years after he last had been heard of, though this was not conclusive. *Flynn v. Coffee*, 12 Allen, 133. *George v. Clark*, 186 Mass. 426. The case before us stands in the same position as if this were an action brought by the administrator of his estate against the plaintiff to recover the amount of these dividends, to which the plaintiff had pleaded the statute of limitations. The first of the dividends was declared in February, 1825; and the ordinary period of limitation, under R. L. c. 202, § 2, would not expire until February 14, 1831. Unless Lloyd survived that date, the cause of action would not be barred until two years after the administrator of his estate had been appointed and had given bond for the discharge of his trust, that is, not before July 17, 1915. R. L. c. 202, § 10. *Gallup v. Gallup*, 11 Met. 445. *Bates v. Kempton*,

7 Gray, 382; 384. The purpose of the Legislature was to extend the time within which actions could be brought, so as to include both the periods mentioned in the statute. *Converse v. Johnson*, 146 Mass. 20, 23. *Sullivan v. Sullivan*, 188 Mass. 380, 382. Such cases as *Hill v. Mixer*, 5 Allen, 27, and *Corliss Steam Engine Co. v. Schumacher*, 109 Mass. 416, in which the action was brought against the personal representative of the debtor, have no application.

But it is not known what was the time of Lloyd's death. We know only that a presumption that he was dead arose in 1825. It was stipulated that the court might draw inferences from the agreed facts. See also St. 1913, c. 716, § 5. We feel compelled to draw the inference that Lloyd died before February 14, 1831. It follows that the case is governed by the provisions of R. L. c. 202, § 10, and that the administrator of Lloyd's estate is entitled to receive the amount of these dividends. It has not been suggested that the rights of a public administrator are in any respect less than those of any other administrator.

A decree must be entered that the net amount of the fund, with the interest accumulated thereon, be paid to the public administrator of his estate.

So ordered.

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- STATE STREET TRUST COMPANY, trustee, vs. GERTRUDE MORRIS, administratrix *de bonis non*, & others.

Suffolk. March 30, 1914. — June 18, 1914.

Present: RUGG, C. J., LORING, SHELDON, DE COURCY, & CROSBY, JJ.

Devise and Legacy. Trust. Executor and Administrator. Words, "Heirs."

A testator by his will placed a fund in trust to pay the income to his sister C during her life and at her death to pay the income in equal portions to C's children during their lives, and, upon the death of any of C's children leaving issue, to pay to the issue one half of the trust fund; and provided that, in case either of C's children should die without issue, "the portion of the one so dying shall revert and become part of the residue of" the estate, discharged of the trust. The residue was given "to my brothers and sisters before mentioned [six in number, including C] and their heirs." All of the six brothers and sisters, after surviving the testator, died, C leaving two daughters, one of whom after-

wards died without issue. The estate of the testator was fully administered and there were no known creditors' claims. On a bill in equity by the trustee for instructions, the estates of the six brothers and sisters being represented by executors or administrators, it was *held* that the words, "and their heirs," in the residuary clause were words of limitation intended to show that the gift made was an absolute one to the brothers and sisters named; that the interest there given vested in the brothers and sisters at the death of the testator, and that one half of the trust fund should be divided equally among the estates of the six brothers and sisters. *Held, also*, that it was not necessary to appoint an administrator *de bonis non* with the will annexed of the estate of the testator, but that the distribution might be made by the trustee.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 28, 1913, and afterwards amended, by the trustee under the will of Thomas M. Devens late of Boston for instructions.

. The facts are stated in the opinion.

The case was reserved by *Crosby, J.*, for determination by the full court.

The case was submitted on briefs.

C. A. Snow, for the administratrix *de bonis non* and others.

A. D. Hill & L. Goldberg, for Sally C. Pierce and Charles Heiser personally and as the executor of the will of Jane Heiser.

J. H. Sherburne, for the heirs at law of two of the sisters of the testator.

LORING, J. Thomas M. Devens by his last will bequeathed \$30,000 in trust to pay the income to his sister, Helen Crocker, during her life and at her decease to pay said income in equal portions to the children of Helen during their respective lives; upon the decease of either of said children leaving issue, to pay to the issue one half of the principal of the trust fund; and in case either of the children should die without leaving issue, "the portion of the one so dying, shall revert and become part of the residue of my estate discharged of any and all trusts and to be disposed of as hereinafter provided." The disposition of the residue was in these words: "All the rest and residue of my property real, personal or mixed I give and bequeath to my brothers and sisters before mentioned and their heirs." There were six "brothers and sisters before mentioned," including Helen Crocker.

Helen Crocker died in 1906, leaving two daughters, Sally Crocker Pierce and Jane Heiser. Jane Heiser died December 6, 1912, without leaving issue. The plaintiff for many years has been and is now the trustee of this trust fund.

Thomas M. Devens died in 1892. The executor of his will filed his final account in 1898 and died in 1904. No known creditors' claims are outstanding against the Devens estate, and no administrator *de bonis non* with the will annexed has been appointed.

Why this bill for instructions was brought is not plain. In case either daughter of Helen Crocker died without leaving lawful issue the share of the trust principal of which she received the income during her life passed under the residuary clause, and all interests in property covered by the residuary clause vested in the six brothers and sisters when Thomas M. Devens died. That they vested then is settled. It is enough to refer to *Trumbull v. Trumbull*, 149 Mass. 200, and *Cummings v. Stearns*, 161 Mass. 506. That Helen Crocker took her share of the remainder is settled. *Abbott v. Bradstreet*, 3 Allen, 587. *Dove v. Torr*, 128 Mass. 38. *Keniston v. Mayhew*, 169 Mass. 166. *Stone v. Bradlee*, 183 Mass. 165. *Smith v. Smith*, 186 Mass. 138. The conclusion reached in *Welch v. Brimmer*, 169 Mass. 204, depended upon the fact that the life tenant was the sole heir to whom the remainder was given.

Under the doctrine of *Minot v. Purrington*, 190 Mass. 336, it is not necessary under the circumstances to have an administrator *de bonis non* with the will annexed appointed for the estate of Thomas M. Devens to make the distribution of this half of the trust fund held by the plaintiff. But the plaintiff can make the distribution of this portion of the residue of his estate.

All the six brothers and sisters are dead, and there are now before the court an executor, or an administrator, or an administrator *de bonis non*, or an administrator *de bonis non* with the will annexed of each one of them; it is the duty of the trustee to pay one sixth of the half here in question to each of them.

It has been argued by counsel for the daughter of one of the sisters of Thomas M. Devens that the shares of the six brothers and sisters should be paid to their heirs and not to their executors or administrators. For this contention counsel rely on cases like *Clarke v. Cordis*, 4 Allen, 466, and *Boston Safe Deposit & Trust Co. v. Blanchard*, 196 Mass. 35, 41. In those cases there was a gift to heirs of a fund made up in part of realty and in part of personalty, and it was held that in case of such gifts heirs take as

distinguished from next of kin. But these decisions have nothing to do with this case. There is no gift to heirs here. Here the gift is a gift to "my brothers and sisters before mentioned and their heirs." The words "and their heirs" are words of limitation used to show that the gift to the brothers and sisters was an absolute one. Gray, J., in *Kimball v. Story*, 108 Mass. 382, 384. *Wood v. Seaver*, 158 Mass. 411. *Bryson v. Holbrook*, 159 Mass. 280. This contention is altogether unfounded.

A decree must be entered directing the plaintiff to pay one sixth of one half of the trust fund to each of the following persons: John H. Sherburne, as he is administrator *de bonis non* of the estate of Martha L. Downes; Gertrude Morris, as she is administratrix *de bonis non* with the will annexed of the estate of Caroline D. Morris; Fannie D. Snow, as she is administratrix *de bonis non* with the will annexed of the estate of Frances P. Sherburne; Cornelia Devens, as she is administratrix of the estate of Henry Devens; James L. Little, as he is executor of the will of Richard Devens; and Sally Crocker Pierce, as she is administratrix of the estate of Helen Crocker. It is

So ordered.

CHARLES R. IRVING & another vs. GARDINER H. SHAW & others.

Suffolk. December 5, 1913. — June 19, 1914.

Present: RUGG, C. J., LORING, BRALEY, & DE COURCY, JJ.

Equity Jurisdiction, To reach property conveyed with intent to hinder, delay and defraud creditors.

On an appeal from a decree dismissing a bill in equity against a debtor of the plaintiff, the debtor's wife and a purchaser of a certain hotel property to reach and apply in satisfaction of the debt owed to the plaintiff certain notes alleged to have been given by the purchaser to the debtor's wife in purchase of an equity in the hotel property which the debtor was alleged to have conveyed to his wife with intent to hinder, delay and defraud his creditors, it appeared that, on evidence not reported, a master found that at the time when the equity was conveyed by the debtor to his wife he was amply solvent and had just undertaken the management of the property, which had been unsuccessful, to make it a paying investment, and that he made the conveyance for the purpose of providing his wife and children (who were living apart from him) with a source of income sufficient for their maintenance, that in a transfer to her a few months

later of a mortgage upon the property and in a foreclosure of the mortgage for her benefit, he acted with the purpose of continuing the investment for the same reasons, that three years and a half later, after the hotel property had proved unsuccessful and the debtor had been insolvent for a little more than half a year, the debtor advised and negotiated a sale of the property to the purchaser at a private sale for a price greater than would have been realized if a forced sale by holders of mortgages had been permitted, that at that time the value of the property had not been increased by expenditures made by the debtor after he became insolvent, and that in all his transactions with regard to the property the debtor at no time acted or caused any action to be taken for the purpose or with the actual intention of hindering or delaying the plaintiff in the collection of his debt. There was no finding by the master that the advance price procured by the sale was caused, apart from the debtor's services, by expenditures made by him while insolvent. *Held*, that the decree dismissing the bill should be affirmed.

BILL IN EQUITY, filed in the Superior Court on October 20, 1911, and afterwards amended, against Gardiner H. Shaw, his wife, Anna A. Shaw, Mina E. Fritz and the International Trust Company, to reach and apply in satisfaction of a debt owed to the plaintiffs by the defendant Gardiner H. Shaw, certain notes given by the defendant Fritz in the purchase of the Hotel Carlton property in Boston from the defendant Anna A. Shaw, to whom Gardiner H. Shaw was alleged to have conveyed an equity in the real estate with intent to hinder, delay and defraud his creditors, and from a corporation which practically was Gardiner H. Shaw, one of the notes having been placed by Anna A. Shaw in the possession of the International Trust Company.

The suit was referred to Arthur P. Hardy, Esquire, as master. The substance of the facts found by him in a first report and a supplemental report is stated in the opinion.

Exceptions to the report were overruled by *Hardy, J.*, the report was confirmed, and a decree was entered establishing a debt due from the defendant Gardiner H. Shaw to the plaintiffs and ordering him to pay it, and dismissing the bill with costs as to the other defendants. The plaintiffs appealed.

W. B. Grant, for the plaintiffs.

J. W. Spring, (*E. H. Abbot, Jr.*, with him,) for the defendant Anna A. Shaw.

H. T. Richardson, for the defendants Gardiner H. Shaw and Mina E. Fritz, submitted their case without argument or brief.

LORING, J. The facts found by the master in his original and supplementary reports are substantially as follows.

In March, 1906, the trustees of a building called the Hotel Carlton applied to the defendant Shaw for assistance in extricating the property from the financial embarrassments into which it had fallen. At this time there was outstanding against the property common stock of the Carlton Hotel Trust (the amount of which is not stated) preferred stock of that trust to the amount of \$150,000; a floating debt amounting "approximately" to \$25,000; a second mortgage for \$150,000 (to the International Trust Company as trustee), and a first mortgage of \$275,000 (to the Old Colony Trust Company as trustee).

Shaw had been the promoter of the enterprise when the Hotel Carlton was built in 1901-1903, but at the time in question (March, 1906), he had no interest, direct or indirect, in it or in its business. At this time (March, 1906), a Mr. Wadsworth owned "the greater part" of the preferred stock and "eighteen twenty-fifths" of the floating debt. It seems to have been assumed that the Old Colony Trust Company mortgage was good, that it was Mr. Wadsworth's interests in the trust which were in jeopardy, and that Shaw's aid was sought by the trustees to save (if possible) Mr. Wadsworth's interests. The mortgage to the International Trust Company was discharged in the following June (June, 1906), seemingly without any payment being made. We infer that it never became operative by the negotiation of bonds under it, and we lay that on one side.

Shaw agreed to take hold of the enterprise. He immediately advanced to the trustees \$2,500 or \$3,000, and later on \$4,500 more, making his advances in all \$7,000 or \$7,500. He also agreed to advance \$8,624.14, which the holders of the floating debt had agreed to accept in discharge of the \$25,000 due them.

In the following June (June, 1906), the trustees executed to Mrs. Shaw a mortgage for \$25,000. The master found that: "The consideration for the mortgage was the money which Gardiner H. Shaw loaned to the Trustees; the obligation which he assumed of paying the bondholders [evidently a mistake for note-holders], and the services which he agreed to render in an attempt to put the property upon a paying basis, which would ultimately redound to the benefit of the preferred stockholders and Mrs. Shaw." At this time the defendant Shaw and his wife were living apart, the separation having taken place some ten months

earlier. They had two children, who remained with Mrs. Shaw. She had no property of her own. The master found as a fact "that it was his [Shaw's] intention in having the \$25,000 mortgage run to Mrs. Shaw, to provide her with a source of income which he then thought would be sufficient to maintain her and the children."

The \$25,000 mortgage was assigned by Mrs. Shaw to Mr. Wadsworth as security for the payment of the \$8,624.14, which was to be paid in satisfaction of the floating debt of \$25,000. Upon the payment of that sum it (the \$25,000 mortgage) was to be reassigned to Mrs. Shaw.

There was a collateral oral agreement between Shaw and Mr. Wadsworth, by which Mr. Wadsworth, who owned eighteen twenty-fifths of the floating debt, agreed to accept Shaw's services in reinstating the financial condition of the property in payment of his (Wadsworth's) share of the \$8,624.14, to be paid in retiring that debt.

In the following September Mr. Wadsworth died, and his successor, Mr. Eliot Wadsworth, refused to abide by this oral collateral undertaking. This brought about a new situation. The new situation was met by the foreclosure of the \$25,000 mortgage to Mrs. Shaw, the buying in of the property by a third person in the interest of Mrs. Shaw, and the making of a new mortgage to Eliot Wadsworth conditioned in substance upon the payment of the \$8,624.14, and subject to that and to the first mortgage to the Old Colony Trust Company, the property was conveyed to Mrs. Shaw. This took place in November, 1906.

About two months before the foreclosure (that is, in September, 1906), Shaw had proceeded to make radical changes in the hotel and in its management. Up to this time it had been run as an apartment house, "only a portion" of the rooms being furnished by the hotel. Shaw determined to develop the transient business, and later on he changed over a part of the premises so as to adapt them for use as an automobile club. At this time also (that is, in September, 1906), Shaw took over the control and management of the hotel and kept it, at first in his own name and later in the name of an incorporated company which was nothing more than Shaw himself, until the property was sold to a Miss Fritz, in July, 1910, as will be hereinafter stated at length.

After the title to the property became vested in Mrs. Shaw, in November, 1906, Shaw paid her \$200 a month as rent in addition to paying the mortgage interest and taxes. Later, when she came to live in the hotel, the \$200 a month was reduced to \$100. This continued until the sale to Miss Fritz already referred to.

When June, 1907, came, the money for paying the noteholders had not been earned by the hotel nor otherwise provided for by Shaw, and another change in the situation ensued. To enable him to raise the money necessary to pay off the holders of the floating debt and to provide money for carrying out his plans with respect to the hotel, Shaw caused the mortgage to Mrs. Shaw to be discharged and a new mortgage for \$25,000 to be made to the International Trust Company to secure twenty-five bonds of \$1,000 each. By a pledge of these bonds Shaw raised \$17,000 or \$18,000, — the amount is stated differently in different parts of the report. Of this \$17,000 or \$18,000, \$8,624.14 was used in retiring the floating debt, and the balance, "approximately \$10,000," was used by Shaw, with the consent of his wife, in "remodeling the first floor, fixing the foundations and making other improvements, such as the construction of a new entrance, a new large dining room, a bar, and other alterations which were of a permanent character." These improvements were not completed until some time in 1909.

In addition to this, "between October, 1906, and the latter part of 1907, he [Shaw] spent approximately twelve thousand dollars (\$12,000) for furniture and furnishings; he paid off a mortgage that was on the furniture when he took over the business; he paid back taxes and insurance amounting to nearly six thousand dollars (\$6,000), and he advanced money for the running of the business." By this time (the latter part of 1907) Shaw's "available cash" was used up and he had many claims outstanding against him. To prevent the running of the hotel from being interfered with by attachments in actions against him, Shaw caused a corporation to be formed, with a capital stock of \$10,000 "issued largely for good will," and thereafter the hotel was run by that corporation until the sale to Miss Fritz in July, 1910.

In the latter part of 1907 Shaw became embarrassed and was unable to pay his debts as they matured in the usual course of business, but he was not then insolvent. "In the latter part of

1909 or the early part of 1910, he was without financial resources," as the master stated the fact, that is to say, he was insolvent. In October, 1909, Shaw borrowed upon a mortgage of the furniture of the hotel \$6,000. Apparently he used \$1,000 of this for purposes not stated, and the other \$5,000 he lent to the corporation to enable it to continue operating the hotel.

In July, 1910, a written agreement was made for the sale of the real estate subject (1) to the first mortgage to the Old Colony Trust Company for \$275,000, and (2) to the second mortgage for \$25,000 and for the sale of the personal property subject to various encumbrances; and this agreement subsequently was carried into effect. As we understand the report some \$14,000 was paid in cash and eight notes for \$5,000 each were given by the purchaser for the balance of the purchase money due under the agreement. The purchaser assumed the payment of the first and second mortgages on the real estate, and gave a third mortgage to secure her eight notes of \$5,000 each.

It is stated in the master's supplementary report that Shaw became indebted to the plaintiffs in the sum of \$2,296.40; to one MacDonald and Joslyn of \$2,351; and to the H. Newton Marshall Co. of \$796.69, making a total of \$5,444.09, for work and materials furnished by them to him in connection with the Hotel Carlton. It was stated at the argument that the present was one of three suits which were tried together before the master (the master's report being in each case substantially of the same effect except as to the amounts due the respective plaintiffs), and that this suit was brought to this court under an arrangement by which the other two suits awaited the decision in this.

The bill here in question was brought by these plaintiffs against Shaw and his wife and Miss Fritz, the purchaser, and the International Trust Company (trustee of the \$25,000 mortgage). The bill proceeded on the ground that the title to the hotel had been put by Shaw in the name of his wife, in November, 1906, to hinder and defraud his creditors. It was alleged that he had no property other than the hotel, and that his wife had none, and the plaintiffs sought to reach and apply the eight notes for \$5,000 each given by Miss Fritz in payment for the hotel, as property of Shaw which had been fraudulently put in the name of his wife.

The master found, however, against this contention. He found

that when Shaw took hold of the Hotel Carlton he was worth from \$15,000 to \$20,000. He also found that in securing the mortgage to Mrs. Shaw for \$25,000 (in June, 1906) "it was his [Shaw's] intention . . . to provide her [Mrs. Shaw] with a source of income which he then thought would be sufficient to maintain her and the children;" that in foreclosing the mortgage and having the title conveyed to Mrs. Shaw in November, 1906, "it was his [Shaw's] purpose and intention to continue the investment for the benefit of Mrs. Shaw and their children;" and that "on account of the lack of success in running the hotel, Mr. Shaw in July, 1910, advised and negotiated the sale of the property and business to the respondent Fritz." The master ended his original report with these words: "I find that at no time did Mr. Shaw do any act or cause any action to be taken in relation to the Hotel Carlton property, whether it be in June, 1906, when he made the original investment, or in October, 1906, when he caused the mortgage to be foreclosed, or in November, 1906, when the equity was transferred to Mrs. Shaw, or in July, 1910, when the notes and \$40,000 mortgage were issued to Mrs. Shaw, for the purpose or with the actual intention of hindering or delaying the complainants in the collection of their account."

After the coming in of the master's report the bill was amended, and the cause was recommitted to the master to report his findings on nine interrogatories there specified. The first of these was to state at what time after November 12, 1906, Shaw became unable to pay his debts as they matured in the usual course of business; and the second was: "Was any part of the value of the equity of the real estate called Hotel Carlton, above the mortgages thereon, on July 15, 1910, due to money which the defendant, Shaw, had applied of his own assets or credits upon said real estate from and after the date when he was no longer otherwise able to pay the debts due to his creditors as they became payable, including those of the plaintiffs?"

The manifest purpose of these interrogatories, both those set forth above and the other seven, was to make out a case under the doctrine of *Lynde v. McGregor*, 13 Allen, 182.

By a subsequent order the master was authorized in his discretion to recall his former report for revision or to change the findings made by him in it. In his supplemental report the master

reviewed the findings made by him in his original report, and explained them. But he did not change them. He found (as we have said already) that while Shaw became embarrassed and was unable to pay his debts as they matured in the ordinary course of business in 1907, he did not become insolvent until the latter part of 1909 or the early part of 1910.

The master further found that "no part of the value of the equity of the real estate called Hotel Carlton, above the mortgage thereon, on July 15, 1910, was due to money which the defendant Shaw had applied of his own assets or credits upon said real estate from and after the date when he was no longer otherwise able to pay the debts due to his creditors as they became payable, including those of these plaintiffs." He found that the fair market value of the Carlton was \$350,000, and that from November, 1906, until the sale in 1910, there was little change in the value of the property. The "appreciation in the value of the land was probably offset by the depreciation due to the increased age of the building." The master, having found that there was no increase in the market value of the Carlton Hotel property, did not answer the interrogatories as to whether Shaw applied any of his own assets upon the real estate after the date when he could not meet his obligations as they matured in the regular course of business, or the further interrogatories as to how much of his assets were so applied.

In reviewing his former findings the master went more at length into the sale of the hotel furniture which belonged to Shaw. In his supplemental report he finds that Shaw sold and assigned the furniture to Miss Fritz on an agreement on her part to assume the outstanding liabilities, and that he did not receive anything from Miss Fritz for the furniture. He further finds that the outstanding liabilities amounted to \$14,537.50, and that the furniture was not worth more than that amount.

It is manifest that the master's report, unless reversed, is decisive against the bill, both on the ground on which it was originally brought and on the further ground that a case was made out under the doctrine of *Lynde v. McGregor*, *ubi supra*, by expenditures on the part of Shaw increasing the market value of the hotel, which expenditures were fraudulent as against Shaw's creditors. The evidence on which the master made the findings is not before

us, and there is nothing in the facts found by the master which shows that they were plainly wrong. The master's report, therefore, must stand.

At the argument before this court the plaintiffs advanced a new and third ground on which they seek to subject the eight notes for \$5,000 to a lien in their favor as creditors of Shaw. That ground is that the money expended by Shaw, even if it did not increase the market value of the hotel, did enable Mrs. Shaw to sell the hotel to advantage, and (as we understand the argument) that the expenditures made by Shaw prevented the hotel from being sold at a forced sale; that the difference between a forced sale and the sale which was in fact made to Miss Fritz far exceeds in amount the debts which are due to the plaintiffs in this suit and in the other two suits already mentioned, amounting to \$5,-444.09.

The difficulty, however, with this contention is that it never has been made in the pleadings nor tried out before the master. There is great reason for supposing that through the expenditures made by Shaw, or through his efforts, in keeping the hotel running, or through both, a forced sale of the property was avoided and a sale to a purchaser who wanted to buy was effected. The greater price derived from that sale over what would have been derived from a forced sale cannot be subjected to an equity in favor of Shaw's creditors unless the plaintiffs prove that this greater price was due to expenditures made by Shaw in fraud of his creditors. If the \$5,000 which was lent to the corporation by Shaw in October, 1909 (when he was insolvent) had been expended on Mrs. Shaw's property in place of being lent to the corporation and if it had been found that that expenditure (apart from Shaw's services) had been the cause of the advantageous sale, it might be that an equity in favor of the plaintiffs on this new ground would have been made out. But the \$5,000 was not expended on Mrs. Shaw's property. It was lent to the corporation. It may be that the advantageous sale was the result of the fact that the hotel had been kept in operation, but the continued operation of the hotel was on its face for Shaw's benefit and not for the benefit of his wife's property. On the findings of the master it cannot be taken to be the fact that Shaw's purpose in keeping the hotel running by and through the corporation was to prevent a forced

sale and bring about an advantageous one. We have spoken of the necessity of the further finding that this expenditure apart from Shaw's services was the cause of the advantageous sale because Shaw's creditors had no right to his services. It is apparent that on the facts found by the master an equity on the ground now urged has not been made out; and, further, that the facts necessary to support an equity on that ground (if an equity on that ground can be made out) would not be a fair inference from the facts found by the master.

The result is that the decree dismissing the bill must be affirmed, with costs, and it is

So ordered.

JOHN D. SHANAHAN vs. ALBERT E. CHANDLER.

Middlesex. November 13, 1913. — June 20, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

*Contract, Performance and breach, Construction, For conveyance of land.
Practice, Civil, Exceptions.*

An agreement by an owner of land, to sell and convey it by a warranty deed "conveying a good and clear title to the same free from all incumbrances," refers to the actual title and not merely to the record title, and it is performed although the owner tenders a deed conveying a title which according to the record is incumbered by an undischarged mortgage, if the conditions of the mortgage have been fully performed and the debt secured thereby has been discharged.

At the trial before a judge without a jury of an action for the recovery of a sum of money deposited by the plaintiff with the defendant in accordance with an agreement whereby the defendant agreed to convey to the plaintiff a certain piece of land by a deed "conveying a good and clear title . . . free from all incumbrances," it appeared that in 1911 the defendant tendered a deed to the plaintiff but that at that time there was on record in the registry of deeds an undischarged mortgage upon the property, that the mortgage was given and recorded in 1871 by a predecessor in title of the defendant to her father to secure a bond, the condition of which was that the daughter should provide her father with suitable maintenance during his life, that the father lived only ten months after the bond was given, and that no administrator of his estate ever had been appointed. There was ample evidence that the condition of the bond had been performed fully. The plaintiff asked the judge to rule "that the title offered was not good beyond a reasonable doubt because of the undischarged mortgage." The ruling was refused and the plaintiff excepted. The judge found for the defendant. *Held*, that the exception must be overruled, because

the question raised by the request was one of fact and not of law, and the judge was justified in finding that the title offered was good beyond a reasonable doubt.

In the same case, the bill of exceptions stated: "It was admitted that the defendant then [at the time when the parties met for the execution of the conveyance] tendered to the plaintiff a deed . . . which satisfied the requirements of the contract, if the title of the defendant was such as the contract specified. The plaintiff testified that he was ready, willing and able to perform his part of the contract, but he alleged that the defendant's title was not such as the contract required, and stated to the defendant on said . . . [date] . . . that there was an undischarged mortgage upon said land as hereinafter described. The plaintiff refused to accept the title and demanded repayment of the deposit which the defendant refused. It was agreed at the trial that the only question for the court was whether the title of the defendant hereinafter described was 'a good and clear title free from all incumbrances.'" *Held*, that on the record it was not open to the plaintiff to contend that at the time when the deed was tendered to him no evidence was shown that the record title could be remedied so that the ruling of the trial judge "would oblige a vendee either to accept the defective title or to assume the risk of removing the incumbrance, or to forfeit his deposit."

CONTRACT to recover \$200 paid by the plaintiff to the defendant as a deposit under an agreement in writing, described in the opinion, for the conveyance of certain land by the defendant to the plaintiff in 1911, the declaration alleging that the defendant failed to tender to the plaintiff a deed conveying a good and clear title to the land. Writ dated June 2, 1911.

In the Superior Court the case was heard by *Fessenden, J.* The facts and rulings made by the judge subject to exceptions by the plaintiff are stated in the opinion.

The judge found for the defendant; and the plaintiff alleged exceptions.

G. M. Poland, for the plaintiff.

T. Eaton, for the defendant.

HAMMOND, J. The agreement provided that the estate should be conveyed by a warranty deed "conveying a good and clear title to the same free from all incumbrances." And one question is whether the title of the defendant was such a title.

At the trial the only objection raised to the title was that a mortgage given by one Preston, a predecessor in title of the defendant, had not been discharged upon the record in the registry of deeds. This mortgage was given by said Preston to her father, to secure a bond the condition of which was that she, the obligor, should provide the obligee, her father, with suitable board and clothing,

care and support during the remainder of his natural life. It was dated May 1, 1871, and was duly recorded the next day. The mortgagee lived only about ten months after the execution of the mortgage. No administrator has ever been appointed on his estate. At the trial there was ample evidence to show that the condition of the bond had been fully performed, and at the close of the evidence the plaintiff did not contend to the contrary.

The plaintiff asked the trial judge to rule: "First. That the title offered to the plaintiff by the defendant was not free from incumbrances as called for by the agreement;" and "Second. That the title offered was not good beyond a reasonable doubt because of the undischarged mortgage" above named. The judge refused so to rule, and the case is before us upon the plaintiff's exceptions to this refusal.

In support of his exceptions the plaintiff argues that the words "good," "clear," and "free from all incumbrances," "should be construed to refer to the record title, because the parties reasonably may be supposed to have used these words with reference to the practical importance that is commonly ascribed to the record title." But this position is untenable. The words are used to indicate the actual title to be conveyed, and that title may be good, clear and free from all incumbrances even if by reason of adverse possession or otherwise its true state be not shown by the record in the registry of deeds, or even if it be inconsistent with such record. See *Conley v. Finn*, 171 Mass. 70, and cases there cited. Plainly upon the evidence the first request could not have been given.

The second request could not have been given. Without reciting the evidence in detail it is sufficient to say that in view of the lapse of time since the mortgage was executed, the nature of the condition of the bond, the shortness of time between the execution of the mortgage and the death of the obligee of the bond, and the fact that the conditions of the bond have been fully performed, taken in connection with the other facts shown, it could not have been ruled as matter of law that there was a reasonable doubt as to the title so far as affected by this mortgage. It does not appear that the facts could not have been easily ascertained upon reasonable inquiry. The question was one of fact

and not of law. *Conley v. Finn, ubi supra. Aroian v. Fairbanks*, 216 Mass. 215, and cases therein cited.

But the plaintiff contends that even if the title of the defendant was in fact good and clear from all incumbrances, and even if his warranty deed would have conveyed all his title, still the right of the plaintiff to recover his deposit "should be decided on the state of facts disclosed to him on the day set by the contract for completing the conveyance." And in support of his contention he argues that "the title then offered to him was defective and no evidence was shown that the defect could be remedied. The ruling of the trial judge would oblige a vendee either to accept the defective title and to assume the risk of removing the incumbrance, or to forfeit his deposit."

But we are of opinion that this point is not open to him upon any fair construction of the record. The bill of exceptions after briefly stating the nature of the action proceeds as follows: "The evidence tended to show that said contract [the written agreement of sale] was executed and a deposit of \$200 was made by the plaintiff, and that on June 1, 1911, the parties met for the purpose of executing the conveyance. It was admitted that the defendant then tendered to the plaintiff a deed of the land which satisfied the requirements of the contract, if the title of the defendant was such as the contract specified. The plaintiff testified that he was ready, willing and able to perform his part of the contract, but he alleged that the defendant's title was not such as the contract required, and stated to the defendant on said June 1, 1911, that there was an undischarged mortgage upon said land as herein-after described. The plaintiff refused to accept the title and demanded repayment of the deposit which the defendant refused. It was agreed at the trial that the only question for the court was whether the title of the defendant hereinafter described was 'a good and clear title free from all incumbrances,' as specified in the contract."

It appears by this statement that the plaintiff's refusal to take the deed was upon the ground that there was upon the record an undischarged mortgage. The statement fairly construed refers only to the actual state of the defendant's title, and has no reference whatever to the question whether knowledge of that actual state was or ought to have been communicated by the defendant

to the plaintiff. The only thing to be tried was whether the title was good and clear notwithstanding the state of the record.

The two requests for instructions are to be construed in the same way. They have reference to the condition of the title at the time of the tender, and not to the circumstances under which the tender was made. If the plaintiff desired to raise the question of the necessity of any explanatory statements on the part of the defendant (as from the record he evidently did not), he should have made the requests more definite in that respect.

The plaintiff suggests that the second ruling was refused on the ground that it was not applicable to the case, but this suggestion is not sustained by the record. Moreover the exception cannot be sustained if the ruling was right upon any ground.

Exceptions overruled.

CATHERINE T. CROWELL vs. EMMA F. TUTTLE & others.

Essex. March 12, 1914. — June 22, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & CROSBY, JJ.

Will, Disqualification of attesting witness. Witness, To will.

Under R. L. c. 135, § 1, which requires that a will should be attested "by three or more competent witnesses," if an instrument presented for proof as a will contains a bequest of \$300 to a church on the condition that it be "applied to the reduction of the present mortgage on the property of said church," a person who is one of the guarantors of the mortgage note given by the church is not a competent witness to the will, although the amount due on the note is small and is exceeded greatly by the value of the mortgaged property.

APPEAL from a decree of the Probate Court for the County of Essex allowing a certain instrument as the last will of Charles Rodrick, late of Swampscott.

The appeal was heard by *De Courcy, J.* The justice found that the instrument presented for proof was executed by Rodrick as his last will on August 7, 1912, in the presence of three attesting witnesses, Albert H. Barrows, Loring Grimes, and Frank O. Ellis, that they signed in his presence, that he was of sound and disposing mind and memory and that the execution of the will was not procured by undue influence. The justice found also

the facts which are stated in the opinion. He ruled that by guaranteeing the mortgage note of the Chapel Congregation of the Church of Christ of Swampscott there described Ellis was not rendered incompetent to act as a witness to the will. Accordingly he ordered that a decree be entered allowing the instrument in question as the last will of Charles Rodrick, and remanding the case to the Probate Court for further proceedings. At the request of the parties, the justice reported the case for determination by the full court.

The case was submitted on briefs.

E. C. Jacobs, E. J. Coughlin & R. W. Currier, for the petitioner.

S. H. Hollis & G. K. Hudson, for the respondents.

HAMMOND, J. At the time Ellis signed his name as an attesting witness he was a guarantor on the outstanding note named in the bequest to the church; and one of the questions is whether by reason of this fact he was rendered incompetent to be such a witness.

By the fifth item of the will the sum of \$300 was bequeathed to the church corporation "on the express condition" that it be "applied to the reduction of the present mortgage on the property of said church." This mortgage was given by the corporation to secure the payment of a promissory note dated January 30, 1889, wherein the corporation promised to pay to the order of the Lynn Institution for Savings the sum of \$4,500 in one year from date, "with interest payable semi-annually . . . at the rate of five per centum per annum during said term and for such further term as said principal sum or any part thereof remains unpaid." Upon the back of this note appears a writing under seal of even date with the note, whereby six persons, of whom Ellis is one, jointly and severally "guarantee the payment of the within note and interest thereon to the [payee] and its assigns, hereby expressly waiving all demand and notice." The interest on this note has been regularly paid, and from time to time partial payments have been made upon the principal, so that at the time the will was executed it had been reduced to \$500. The note was a promise to pay a certain sum "in one year from date," and interest so long as any part of the principal should remain unpaid. As to interest at least, it was a continuing promise. The guaranty was as broad as the note.

It is urged, however, by the petitioner that since the mortgaged estate was worth much more than the amount due on the note Ellis was not interested in its payment. But the holder could look solely to the note, nevertheless, and collect of the guarantors without reference to the value of the estate. The liability of the guarantors remained the same. It is also urged by the petitioner that the guarantors had a perfect defense in the statute of limitations. But this position is untenable. The guarantors are liable to pay the interest which may arise in the future.

It is plain, therefore, that at the time of the execution of the will Ellis had a direct pecuniary interest in the subject matter of this bequest. This interest was small, but as was said by Wilde, J., in *Haves v. Humphrey*, 9 Pick. 350, 356, "such an interest, however minute, will disqualify a witness." See also the authorities cited in 3 Dane Abr. c. 90, art. 4.

Although many changes have been made by our statutes in the rules of the common law as to the competency of witnesses, no statute has been passed which allows a person having a direct, private, pecuniary interest in a legacy such as Ellis here had, to be a competent witness to the execution of a will. See, as bearing generally upon this branch of our law, in addition to the authorities hereinbefore cited, Sts. 1783, c. 24; 1792, c. 32; Rev. Sts. c. 94, § 54; St. 1852, c. 312, § 60; and the subsequent codifying statutes, including R. L. c. 175, §§ 20, 21; *Haves v. Humphrey*, 9 Pick. 350; *Haven v. Hilliard*, 23 Pick. 10, and cases there cited; *Sullivan v. Sullivan*, 106 Mass. 474; *O'Connell v. Dow*, 182 Mass. 541.

It follows that the ruling that Ellis was a competent witness was erroneous. It becomes unnecessary to consider the other questions raised by the report. The decree admitting the will to probate should be reversed, and the case remanded to the Probate Court; and it is -

So ordered.

HEATH HUGHES vs. JOSEPH E. WILLIAMS.

Middlesex. December 9, 1913. — June 26, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Sale, On execution. Attachment. Bona Fide Purchaser for Value. Evidence.
To show knowledge by attaching creditor of defective title of debtor.

In order to prove that a creditor, who in an action for the collection of his debt caused an attachment of land standing in the name of his debtor to be made, had knowledge of the fact that the debtor before the attachment had delivered a deed of the premises to another, it is not necessary to prove positive knowledge on his part, but intelligible information of the fact, conveyed to him either orally or in writing from a source which ought to be heeded, is evidence upon which such knowledge can be found.

If a petitioner for the registration of the title to certain land purchased the land at a sale upon an execution issuing in an action in which it had been attached upon meane process, and at the time of the sale the petitioner knew that before the attachment was made the debtor had delivered a deed of the land to another who had not recorded it, the title should not be registered unless the petitioner proves that at the time of the attachment the attaching creditor did not have knowledge of such a deed by the debtor; and, while at the trial of such an issue evidence is admissible as to conversations with and conduct on the part of the creditor before the attachment, tending to show such knowledge on his part, evidence of statements made by the creditor or his attorney after the attachment are irrelevant and inadmissible. In the present case error in the admission of such evidence was held not to have been cured by certain instructions given to the jury, and exceptions thereto were sustained.

PETITION, filed in the Land Court on August 11, 1909, for the registration of the title to land on Cambridge Street in Cambridge.

The petition was heard in the Land Court by Davis, J., who ordered a decree for the petitioner. Upon an appeal by the respondent under St. 1905, c. 288, the issues stated in the opinion were framed and were tried before Hardy, J. Other proceedings and the evidence at the trial are described fully in the opinion. The findings upon the issues were favorable to the respondent; and the petitioner alleged exceptions.

A. P. Gay, for the petitioner.

G. C. Dickson, (F. Paul with him,) for the respondent.

BRALEY, J. The petitioner, under his application for registration in fee of the land in controversy, had the burden of proving title in himself, which did not shift, although the weight or preponderance of the evidence might change from one side to the other during the proceedings. *Bigelow Carpet Co. v. Wiggin*, 209 Mass. 542. *Carroll v. Boston Elevated Railway*, 200 Mass. 527, 536. *Faxon v. Folvey*, 110 Mass. 392, 395. Jackson on Real Actions, 156, 157, 158.

It appears that he derives his alleged ownership from a sheriff's deed given on an execution sale under an attachment made in an action brought by one Duckrey against one Jones. The respondent had owned the land for several years when he deeded it to Jones and this deed was duly recorded, but the reconveyance of even date from Jones to Williams, who has always remained in possession, was not recorded; and during the time when the record title stood in the name of Jones the property was attached on mesne process by Duckrey, although the junior conveyance was recorded before the execution sale, which followed upon the recovery of judgment. The Land Court having ordered a decree for the petitioner, the following issues were certified into the Superior Court for trial:

1. Did James H. Duckrey before his attachment of the property in question have actual knowledge of the existence of the deed back from Jones to Williams of July 5, 1901?
2. Did the respondent Williams permit the execution sale to go on without protest?
3. Was the petitioner Hughes a purchaser of said property for value?
4. Was the petitioner Hughes informed before he purchased said property at the execution sale that the beneficial interest was in Williams; and that Jones had a bare record title?

The jury answered the first, third and fourth issues in the affirmative, and the second issue in the negative.

During the trial the petitioner took exceptions to the admission of evidence, to the refusal of the presiding judge to rule as requested, and to his instructions to the jury, which will be considered in this order.

If the amendment offered by the respondent in substitution for the fourth issue had been allowed, the question to be tried would

have been more clearly stated, yet the construction adopted by the judge of the Superior Court as to what this issue meant presented the essential inquiry, whether the petitioner at the sale on execution was a purchaser for value without notice of the unrecorded deed. *Luce v. Parsons*, 192 Mass. 8. *Christiansen v. Lannin*, 215 Mass. 322. *Clark v. Watson*, 141 Mass. 248. The petitioner although purchasing at an execution sale is protected equally with the purchaser who buys at a private or voluntary sale from the claims of third parties, acquired from the judgment debtor, but of which he has no actual or constructive notice. *Woodward v. Sartwell*, 129 Mass. 210. It is conceded that a valuable consideration passed, but the mere payment of the purchase price and delivery of the deed by the deputy sheriff are of themselves insufficient to establish priority of title. *Wenz v. Pastene*, 209 Mass. 359, and cases cited. The respondent, having recorded his deed after the attachment but before the levy, there was evidence that the petitioner was informed by counsel whom he employed to examine the title that the deed appeared of record, and notwithstanding the petitioner's testimony in denial, the jury were warranted on this evidence and the further testimony of his having been told by other parties that the property belonged to Williams in finding that previous to the purchase the petitioner knew the respondent at the date of the attachment was seised in fee of the land as between himself and Jones.

The obscure wording of the fourth issue cannot do away with the full effect of the affirmative answer of the jury which established the fact of notice, and, to prevail, the petitioner must stand on the title as shown by the land records at the date of the attachment. *Adams v. Cuddy*, 13 Pick. 460, 464. *Glidden v. Hunt*, 24 Pick. 221. *George v. Wood*, 9 Allen, 80, 83. *Morse v. Curtis*, 140 Mass. 112.

The first issue accordingly was framed to try the question of the knowledge of Duckrey, the attaching creditor. If he did not have actual notice of the unrecorded deed at the date of the attachment, May 24, 1906, the petitioner, even if chargeable with notice at the sale, would succeed to Duckrey's title by force of the levy. R. L. c. 127, § 4. *Coffin v. Ray*, 1 Met. 212. *Woodward v. Sartwell*, 129 Mass. 210. *Livingstone v. Murphy*, 187 Mass. 315.

The petitioner's exceptions to the admission of evidence are largely connected with this issue. The petitioner's title under the first issue depends upon Duckrey's knowledge, for the petitioner stands in Duckrey's place with its disabilities as well as its advantages. *Glidden v. Hunt*, 24 Pick. 221, 226. *Aldrich v. Adams*, 166 Mass. 141, 142. The inquiry is a question of fact. It is not necessary to prove positive knowledge. "Intelligible information of a fact, either verbally or in writing, and coming from a source which a party ought to give heed to, is generally considered as notice of it, except in cases where particular forms are necessary." *George v. Kent*, 7 Allen, 16, 18. The exceptions recite that apart from the evidence excepted to, "there was evidence from the respondent's witnesses tending to show that Duckrey knew the nature of and the reasons for the transfer of the property in question from Williams to Jones and that he had such knowledge at the time of such transfer; that Duckrey knew of the reconveyance of the property from Jones to Williams and that he had such knowledge at about the time of such reconveyance; that Duckrey upon many occasions long before the attachment in question, told different persons that the property was 'Williams' property;' that Duckrey always knew of Williams' occupancy of the property; that Duckrey had actual notice of the unrecorded deed of July 5, 1901, from Jones to Williams long before he made his attachment . . . , and that he made said attachment with knowledge of the existence of said unrecorded deed."

The question of Duckrey's knowledge, which had become a matter for investigation, being involved, evidence as to conversations with him before the attachment, as well as his conduct prior thereto were admissible and the effect of this evidence was for the jury. It was evidence even if cumulative, tending to show that he knew of the actual state of the title at the time when he caused the attachment to be made. *Adams v. Cuddy*, 13 Pick. 460, 464. *Lawrence v. Stratton*, 6 Cush. 163, 167. *Toupin v. Peabody*, 162 Mass. 473, 478. *Sturbridge v. Franklin*, 160 Mass. 149. *Keane v. Old Colony Railroad*, 161 Mass. 203. *Fowle v. Child*, 164 Mass. 210, 213. *Buffum v. York Manuf. Co.* 175 Mass. 471. *Marcy v. Shelburne Falls & Colrain Street Railway*, 210 Mass. 197, 199. But the statements of Duckrey or of his counsel

subsequently made should have been excluded. His declarations after the date of the attachment were inadmissible to impeach the title of the petitioner who is to be treated as if on May 24, 1906, Duckrey had conveyed the land by deed. It is the title of Duckrey at that time which the petitioner obtained. *Winchester v. Charter*, 97 Mass. 140. *Rawson v. Plaisted*, 151 Mass. 71. *O'Donnell v. Hall*, 154 Mass. 429, 431. It is true that the judge said that he admitted the evidence for a limited purpose, "to show what Duckrey's knowledge was of the property. It does not affect Hughes." Duckrey's knowledge, however, after the date of the attachment was immaterial and the evidence could not fail to have been prejudicial to the rights of the petitioner as the successor to Duckrey's title. Nor was this error cured by the instructions. The jury were erroneously told in effect that they could consider the evidence "as bearing upon the knowledge that Duckrey had as to this title."

The request for a ruling that "the 'beneficial interest' mentioned in the fourth issue means something other than the interest which the respondent Williams had as holder of the legal title under the deed from Jones to him of July 5, 1901," was properly refused for reasons sufficiently stated.

The request, that there is no evidence that Williams had any interest in the property other than as holder of the legal title, was given in the charge. The judge could not rule in accordance with the next request "that there is no evidence upon which the jury can answer the fourth issue in the affirmative." It appeared from the testimony of the respondent admitted without objection, in his direct examination, that the petitioner had been told by Duckrey not to buy and had been informed that it was his, the respondent's, and not Jones's property, and notwithstanding this information the petitioner had bought. Whether the petitioner was to be charged with notice on all the evidence was for the jury. *Boynton v. Rees*, 8 Pick. 329, 332.

The request, that the evidence of continued possession and occupation of the premises or the payment of taxes by the respondent was of itself wholly insufficient to warrant the conclusion that Duckrey had actual knowledge of the deed in question, and that the testimony of the respondent's witnesses that Duckrey, before the time of his attachment, had said that "he did n't

want to put an attachment on Jones because he knew Jones held Williams's property and that he did not want to hurt Williams," does not warrant the conclusion that Duckrey then had actual knowledge of the unrecorded deed back from Jones to Williams, called for instructions on a part only of the evidence which the judge was not required to give. *Hicks v. New York, New Haven, & Hartford Railroad*, 164 Mass. 424, 428. Besides the judge in appropriate language fully pointed out what the jury must find on the evidence before the respondent could prevail on any of the issues.

The last request, that "It is Duckrey's actual knowledge of the existence of the deed back from Jones to Williams, not his knowledge of Williams's ownership of the property that is the question in the first issue, and proof that Duckrey had stated he knew, or proof that he had been told that Williams owned the property or that the property belonged to Williams, is not of itself sufficient to warrant the jury in answering the first issue in the affirmative," was sufficiently covered by the instructions. It could not have been given in terms. *Sibley v. Leffingwell*, 8 Allen, 584, 586. *Boynton v. Rees*, 8 Pick, 329, 332.

It is further urged that the charge was erroneous. But we find no error except as previously noted. The jury properly were allowed to pass upon the questions raised by the first issue under instructions, that the entire interest in the premises, legal as well as beneficial, was in Williams as between himself and Jones. The instructions under the second issue rightly left to the jury the question whether the respondent protested to Duckrey and objected to the sale, and if Duckrey promised to go and see what could be done in stopping the sale, then the jury could find that Duckrey was to act in the respondent's behalf. The evidence admitted without objection, shows that Duckrey reported to Williams, that he "had done all he could to prevent Hughes from buying, that he told Hughes not to buy, that he told Hughes it was Williams's property, not Jones's, and that Hughes bought in spite of him." The ruling as to the burden of proof as to this issue was also correct. If the petitioner relied upon Williams's conduct as working an estoppel, he was required to prove it.

The instructions concerning the knowledge of the petitioner as to the condition of the title at the date of the execution sale were

warranted by the evidence. The jury could find the petitioner had been informed by counsel employed by him to examine the record, that at the date of the attachment the unrecorded deed was in existence, and before the sale it had been recorded. Nor was it necessary that this deed or a certified copy of it should have been exhibited to the petitioner. It was enough that his counsel knew of its contents from the record and so informed his client, as the jury well may have found.

The judge defined with sufficient accuracy the estate of the respondent, and construed the fourth issue as presenting the question the parties actually had tried, and correctly left to the determination of the jury the questions of fact which depended upon the credibility of the witnesses and the view they took of the testimony.

While the error in the admission of evidence and the instructions relating to this evidence require us to sustain the exceptions, the verdict is to stand as to all the issues except the first, to which the new trial is to be confined. *Burke v. Hodge*, 211 Mass. 156.

So ordered.

CASWELL JOHNSON vs. FERDINAND VON SCHOLLEY & others,
trustees.

Suffolk. November 14, 1913. — August 4, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Joint Tortfeasors. Covenant, Not to sue. Release. Accord and Satisfaction. Contract, In writing. Evidence, Extrinsic affecting writings.

An instrument under seal, delivered to one of two joint tortfeasors in consideration of a sum of money paid by him to the person who suffered from the tort, whereby such person covenanted "to forever refrain from instituting, pressing or in any way aiding any claim, demand, action or causes of action for damages . . . for or on account or in any way growing out of" the tort, does not operate as a release of the injured person's cause of action against the other tortfeasor.

In an action for personal injuries against one of two joint tortfeasors, the defendant alleged in his answer that the plaintiff "presented to" his co-tortfeasor "a claim for damages" caused by the joint tort "and that thereafter" the co-tortfeasor "paid to the said plaintiff and the said plaintiff accepted" a sum of money "in satisfaction of the damages alleged in the declaration." The defend-

ant offered in evidence, and the presiding judge admitted, an instrument under seal, which the plaintiff, in consideration of money paid by the co-tortfeasor, had delivered to the co-tortfeasor and in which the plaintiff had covenanted with the co-tortfeasor "to forever refrain from instituting, pressing or in any way aiding any claim, demand, action or causes of action for damages" caused by the joint tort. The defendant also offered and the judge excluded evidence tending to show that negotiations which occurred between the plaintiff and the co-tortfeasor previous to the execution of the covenant were for the purpose of a settlement and discharge of the claim for damages alleged in the declaration. *Held*, that the exclusion of the evidence was wrong, because the defendant, not being a party to the instrument in writing, had a right to show by oral evidence that it did not express the terms of the actual compromise.

TORT for personal injuries received by the plaintiff, while a passenger on an elevated street car of the Boston Elevated Railway Company, by reason of a collision on Charles Street in Boston between that car and an automobile truck of the defendants, who were doing business under the name Burkhardt Brewing Company. Writ dated September 16, 1912.

The answer of the defendants, as amended, contained, besides a general denial, allegations that the plaintiff "presented to the Boston Elevated Railway Company a claim for damages for the injuries and damage sustained by him by reason of the accident set out in said declaration, and that thereafter the said Boston Elevated Railway Company paid to the said plaintiff and the said plaintiff accepted the sum of \$200 in satisfaction of the damages alleged in the declaration to have been received by the plaintiff, whereby the said plaintiff's cause of action was wholly settled and discharged."

The case was tried by *Lawton*, J. On the issue raised by the defense specially alleged in the answer and "for the purpose of showing a claim for damages by the plaintiff against the railway company arising out of the accident alleged in the declaration, and the payment by the railway company and acceptance by the plaintiff of a sum of money in settlement of the claim," the defendants offered in evidence letters to the Boston Elevated Railway Company from four different attorneys at law, each setting forth a claim for damages for the collision described in the plaintiff's declaration, a letter from the plaintiff discharging one of the attorneys, further letters from William Burns, Esquire, who remained as counsel, and an instrument, signed under seal by the plaintiff by his mark, which read as follows: "Sept. 16,

1912. This is to certify that William Burns is my attorney; that I have no other attorney; that it is my desire that Wm. Burns settle my case against the Boston Elevated Railway Company for the sum of two hundred dollars; that my rights be reserved against the Burkhardt Brewing Co." These letters and the instrument were excluded.

The defendants also offered in evidence, and the judge admitted, the following instrument signed under seal by the plaintiff by his mark on September 16, 1912, and entitled "Covenant not to Sue."

"I, Caswell Johnson, of Boston, in the County of Suffolk and Commonwealth of Massachusetts, my heirs, executors and administrators, in consideration of Two Hundred Dollars (\$200) to me paid by the Boston Elevated Railway Company, a corporation established under the laws of Massachusetts, the receipt of which is hereby acknowledged, do, by this instrument, covenant with the said Boston Elevated Railway Company to forever refrain from instituting, pressing or in any way aiding any claim, demand, action or causes of action for damages, costs, loss of services, expenses or compensation for or on account of or in any way growing out of, or hereafter to grow out of, an injury received by me on or about the 9th day of July, 1912, at or near Charles Street near the center gate of the Common wherein I was injured."

The payment of \$200 by the street railway company to the plaintiff was admitted.

The defendants then offered to show by evidence of conversations between the claim agent of the Boston Elevated Railway Company and the plaintiff's attorney that there were negotiations between them in reference to the plaintiff's claim and that the sum of \$200 was agreed upon to be paid in settlement of his damages. These conversations were before the execution of the covenant not to sue, and were excluded by the judge.

At the close of the evidence the defendants admitted that under the rulings of the judge excluding the evidence offered by him, there was nothing for the jury under their special plea. The case was submitted to the jury upon the other questions involved and a verdict was returned for the plaintiff in the sum of \$1,000. The defendants alleged exceptions.

The case was submitted on briefs.

W. C. Cogswell, for the defendants.

W. Burns, for the plaintiff.

BRALEY, J. The defendants and the railway company upon the record were concurrent tortfeasors, and an unqualified release of the company under seal would have discharged them. *Feneff v. Boston & Maine Railroad*, 196 Mass. 575. *Boston Supply Co. v. Rubin*, 214 Mass. 217. But the covenant not to sue put in evidence by the defendants did not operate as a discharge of the plaintiff's cause of action; it only barred the remedy against the company for reasons stated in *Matheson v. O'Kane*, 211 Mass. 91.

The amended answer, however, pleaded in general terms an accord and satisfaction with the company whereby the defendants had been relieved from liability. It is settled that, not having been parties or privies to the instrument, the defendants could show by parol evidence that the instrument did not express the actual compromise. *Kellogg v. Thompson*, 142 Mass. 76. See *Snow v. Alley*, 151 Mass. 14.

The correspondence between the various attorneys representing the plaintiff and the company, as well as his personal letter to it, were admissible as evidence of a demand for damages, and as preliminary to the final agreement in so far as the negotiations were authorized by him. *Pickert v. Hair*, 146 Mass. 1. *Loomis v. New York, New Haven, & Hartford Railroad*, 159 Mass. 39. *James v. Boston Elevated Railway*, 201 Mass. 263. It is to be noted that previous to September 21, 1912, the correspondence relates only to a claim against the company, or notice to it by the plaintiff of the discharge of former counsel and the retaining of new counsel. No offer to settle without suit appears.

The authority of an attorney under a general retainer to compromise a claim of his client's, which is referred to in *Brewer v. Casey*, 196 Mass. 384, 388, where the earlier cases are cited, is not presented by the record. See also *Gilman v. Cary*, 198 Mass. 318.

The plaintiff's instructions in writing to counsel then acting for him, offered in evidence by the defendants but improperly excluded, expressly authorized a settlement upon condition "that my rights be reserved against the Burkhardt Brewing Co.," the name under which the defendants are described in the writ, although the legal form in which the settlement should be expressed

is not stated. It was left to his counsel. The conversations between the agent of the company to whom the instructions had been transmitted and the plaintiff's attorney, which took place before the covenant not to sue was executed, also were admissible if limited to the restrictions imposed by the instructions. *New York, New Haven, & Hartford Railroad v. Martin*, 158 Mass. 313, 316, 317. *Riley v. Boston Elevated Railway*, 195 Mass. 318, 322. *Lewis v. Gamage*, 1 Pick. 347. The jury should have been permitted to determine on all the evidence whether the covenant not to sue embodied the settlement the plaintiff had authorized, and which had been actually effected. If they found that it did, the defendants had not been discharged. But, if notwithstanding the covenant not to sue, the defendants on whom rested the burden of proof had shown that the plaintiff in fact had compromised his claim without qualification, the action could not be maintained. *Boston Supply Co. v. Rubin*, 214 Mass. 217.

Exceptions sustained.

HENRY MARTIN vs. ARTHUR D. CURRAN & another.

Suffolk. March 22, 1914. — September 9, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Negligence, Employer's liability.

In an action by an experienced workman against his employer, the proprietor of an elliptical coal run for loading vessels, for personal injuries sustained while the plaintiff, who was stationed at the scales which had been his place of work for a number of months, having weighed one of the cars filled with coal, was connecting it with the endless chain that moved the cars, by a disconnected car being pushed against him by a third car that was attached to the chain, it appeared that the plaintiff had told the defendant's engineer that the cars were coming in too rapid succession and that the engineer thereupon had reduced the rate of speed of the engine when the defendant's superintendent came into the engine room and said, "I am boss here; run that machine to speed," whereupon the engineer ran the engine at substantially the same rate of speed as before the plaintiff spoke to him, and the accident occurred. *Held*, that the order of the superintendent did not mean that the engine should be run at an unusual rate of speed, but simply meant that it should be run at its usual

rate of speed, thus restoring the successive arrival of the cars at the scales to its normal basis, of which the plaintiff required no notice, and that the order, thus fairly construed, was no evidence of negligence on the part of the defendant.

TORT for personal injuries sustained by the plaintiff on November, 14, 1901, while in the employ of the defendants, who sometimes did business under the name of the Pocahontas Coal Company, at the coal run owned and operated by them at 462 Summer Street in Boston. Writ dated September 19, 1902.

In the Superior Court the case was tried before *Richardson, J.* At the close of the evidence, which is described in the opinion, the judge ruled that the action could not be maintained and ordered a verdict for the defendants. He agreed with the counsel to report the case for determination by this court, upon the stipulation of the parties, that, if the ruling and order were correct, judgment should be entered on the verdict for the defendants; otherwise, that judgment should be entered for the plaintiff in the sum of \$4,000.

After the death of *Richardson, J.*, the case was reported by *Crosby, J.*, under R. L. c. 173, § 108, as amended by St. 1912, c. 317.

The case was submitted on briefs.

J. H. Baldwin & F. P. Garland, for the plaintiff.

W. B. Sprout & F. B. Kendall, for the defendants.

HAMMOND, J. This is an action of tort to recover for personal injuries sustained by the plaintiff by reason of an accident which occurred on November 14, 1901, while he was working on a coal run owned and operated by the defendants. The run was an elevated trestle structure, elliptical in shape and over three thousand feet in its entire circuit. Upon its top was a "two foot gauge track" over which were run small coal cars weighing when loaded about fifteen hundred pounds each, propelled by means of an endless cable which when in motion ran "north on the east track and south on the west." The cars were run over the scales at the scale house, so called, which was on the east side of the run; and each car was stopped upon the scales for the purpose of being weighed. At the scale house and at various other places around the circuit there were push buttons, by means of which employees could signal the engineer to start or

stop the engine, and thus start or stop the cars. The cars also could be controlled independently of the cable by loosening the grip and applying the brake. In this way any or all of the cars could be stopped while the cable was in motion. Between the scales and the engine house and over the east track were three towers, beside and extending above the trestle work structure, each tower having a hopper and machinery for hoisting coal from a vessel, the hopper being raised and swung over the cars, which were stopped on the track by means of loosening the grip long enough to receive the coal; the grip then being tightened, the car went forward. These towers were movable, and on the night of the accident the one nearest the scales was about forty feet distant from them. Upon the rear end of each car was a platform through which extended the grip mechanism by which the cars were "made fast to or loose of the endless cable." Each car was furnished with a brake. The cars could be stopped under the towers for loading or on the scales for being weighed or for any other purpose by loosening the grip and putting on the brake, which generally was done by a man on foot following the car. When one car was stopped on the scales for the purpose of weighing, the car immediately behind would be approaching the one stopped; after the first car was weighed and had started along, the second car coming upon the scales would in turn be stopped for weighing and the first car would regain its distance, while the third car would be approaching nearer the second, and so on. The same process would take place when the cars were stopped under either of the towers for loading. Somewhere along that portion of the track, where the double cable ran, it was necessary to stop the car for the purpose of changing the grip from one cable to the other. The plaintiff was injured by being caught between two cars.

At the time of the accident the plaintiff was stationed at the scales, and his duty was to ungrip the car, stopping it by the brake if necessary, so that it could be weighed, and when he received the signal that it had been weighed, then to take off the brake and start the car by the grip. He had been doing this work for several months. A fellow servant named Garo was at work near him, regulating the speed of the cars as they approached the scale house to be received by the plaintiff.

The plaintiff testified that when he went to work at seven o'clock on the evening of the accident, "the cars came very fast, and he had all he could do to handle them, and he thought if he stayed there without notifying the engineer he would get hurt, and he found them coming so fast he couldn't handle them; that he had one car on the scales and gripped it and started it going; that then he pressed the button near the scale-house, which connects into the engine-room," and "spoke to the engineer." He further testified that for a little more than half an hour the cars seemed to come "at a moderate rate of speed, and he kept on gripping the cars as they came."

As to the manner of his accident, he testified on his direct examination as follows: "Then [at the end of the 'little more than half an hour' above named] he noticed two cars coming very close together, . . . he would say about four feet apart, and Garo following one car up, the last car, and he, the plaintiff, went up and handled the first car, threw off the grip, put the brake on and stopped it on the scales about the same time Garo stopped his car behind him (the plaintiff), and he just waited long enough to turn around to see if Garo was still standing there, and he put his leg in to grip, and just had the wire out, the other one in, and a jar threw his head back and the other car coming behind him came against him and hit him down his left knee and leg; that when the car struck him he kept on to the grip, and the car ahead of him dragged him about six feet, he would say, then he let go and rolled off; that at that time the grip was on, but he was pretty sure it was n't tightened, and it was the bumping of the other car that caused him to be dragged."

On cross-examination he testified that just before the accident he "saw the two cars coming very close together, one of which was the car that hit him; that the car that hit him, the first one after the one that he stopped, was about nine feet away from him and fifteen feet from the scales; that he knew that these two cars were being propelled by the cable and that the cable was in motion, and that these cars had got to come where he was unless he got out of the way, and that he did not get out of the way; that at the time he was just gripping a car, which was done at the rear end of the car, so that he was standing somewhere between the car that he was gripping and the two cars that he saw

coming toward him." He further testified in substance that there were three cars in the vicinity at the time of the accident, namely, the one he was trying to grip, the one next to it which had been ungripped by Garo who was standing by it, and a third three or four feet behind the second which was still gripped. Of these three cars the first two were stationary, while the third was still moving toward the other two; that in this state of things he put his leg in between the two stationary cars; that then the second car came up on to him, and he "assumes" that the third car following along, gripped to the cable, struck the second car and pushed it against him. He further testified that he knew there was bound to be a third car coming up very soon, and that when that third car came up it was bound to carry that second car along with it if that third car was not stopped. He further testified that he could operate the grip and brake while standing outside the rail, but "it would be awfully slow the way the cars were coming."

Whether the whole evidence would warrant a finding that the plaintiff was in the exercise of due care is a question of some difficulty; but, in view of the conclusion to which we have come upon the question of the negligence of the defendants, it has become immaterial.

There is no evidence of any defect in the ways, works and machinery. At the time of the accident everything was working smoothly and as it was intended to work. But the plaintiff maintains that the order given to the engineer by Sensibough, the defendants' foreman, was negligent. Upon this part of the case there was evidence which, although slight and somewhat vague, would justify a finding that on the night in question, after the plaintiff had talked with the engineer and before the accident, the superintendent (Sensibough) came into the engine room and finding that at the request of the plaintiff the engine was running at a reduced rate of speed, said, "I am boss here; run that machine to speed," whereupon the engine was run at substantially the same speed as before the plaintiff talked with the engineer.

We do not understand that this order meant that the engine should be run at an unusual speed, but simply that it should be run at its usual speed, the speed at which it was intended to be

run. It cannot be construed to mean that if at any time the actual or relative position of any of the cars was such as to create any dangerous situation the power was taken away from the plaintiff or any other employee to have the cable stopped by signalling by means of the button to the engineer, or if necessary to grip or ungrip any car. It was simply an order for the conduct of the business in the usual way and under the usual conditions. The superintendent had the right to assume that an experienced workman, as the plaintiff then was, would observe the speed of the cars, as he did, and would govern himself accordingly; and that there was no need of giving him notice of the order or further instructions as to what to do or how to act. By this order the business was placed on its normal basis, and such by the fair construction was its intention. It appears further that one less than the usual number of cars was being run on the evening of the accident, and there appears to have been no reason to anticipate any unusual situation. Under these circumstances the order, fairly construed, cannot be regarded as a negligent order. The case differs materially from *Carroll v. New York, New Haven, & Hartford Railroad*, 182 Mass. 237; *Baggeski v. Lyman Mills*, 193 Mass. 103; *Carroll v. Fore River Ship Building Co.* 208 Mass. 296, and similar cases cited by the plaintiff.

Judgment on the verdict.

THOMAS F. TIGHE & others vs. MARYLAND CASUALTY
COMPANY.

Suffolk. May 20, 1914. — September 9, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Insurance, Against liability. Superior Court. Words, "Court of last resort."

Under a provision, contained in a policy of insurance against loss from liability imposed by law upon the insured for damages on account of bodily injuries, that no action shall lie against the insurer for any loss under the policy unless it is paid by the insured in satisfaction of a judgment, "nor unless such action is brought within ninety days after such judgment, by a court of last resort," the payment of a judgment of the Superior Court, which under R. L. c. 157, § 3, has exclusive original jurisdiction of such an action, satisfies the requirement.

Under a provision, contained in a policy against loss from liability imposed by law upon the insured for damages on account of bodily injuries, that such loss shall not be recovered unless paid by the insured in satisfaction of a judgment "after trial of the issue," it is no defense to an action on the policy that the judgment paid by the plaintiff was obtained by default without a trial, if the plaintiff gave adequate and seasonable notice of the action to the insurer and the insurer appeared and filed an answer and afterwards declined to defend the action; as the insurer cannot be allowed to take advantage of the non-performance of a condition precedent due to its own mistake or misconduct.

CONTRACT, upon a policy of liability insurance, for the sum of \$5,181.50 paid by the plaintiffs upon a judgment obtained against them by one Matthew Adler, a minor, in an action for bodily injuries, the plaintiffs alleging that they gave seasonable notice to the defendant of the claim of Adler against them. Writ dated August 18, 1910.

In the Superior Court the case was tried before *Aiken*, C. J. The material portions of the policy were as follows:

"In consideration of Two Hundred Sixty and 25/100 Dollars (260.25) estimated premium and the statements hereinafter set forth in the Schedule of Statements, which statements the Assured makes and warrants to be true by the acceptance of this policy, except the statements concerning the number of drivers and their compensation, which are estimated, the Maryland Casualty Company, hereinafter called the Company, hereby agrees to indemnify T. Tighe and Sons, of Boston, County of Suffolk, State of Massachusetts, hereinafter called the Assured, for a period of Twelve months, beginning on the thirtieth day of December, 1905, noon, and ending on the thirtieth day of December, 1906, noon, standard time, at the place where this Policy has been countersigned, against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death, accidentally suffered while this Policy is in force, by any person or persons, by means of the draught or driving animals of vehicles for which a charge is made in the premium, and the use thereof as hereinafter set forth while in charge of the Assured or the Assured's employees, subject to the following conditions:

"Condition C. Upon the occurrence of an accident the Assured shall give immediate written notice thereof, with the fullest

information obtainable at the time, to the Company's Home Office or to the Company's authorized agent. If a claim is made on account of such accident, the Assured shall give like notice thereof with full particulars. The Assured shall at all times render to the Company all co-operation and assistance in his power.

"Condition D. If thereafter any suit is brought against the Assured to enforce a claim for damages on account of an accident covered by this Policy, the Assured shall immediately forward to the Company's Home Office every summons or other process as soon as the same shall have been served on him, and the Company will, at its own cost, defend such suit in the name and on behalf of the Assured unless the Company shall elect to settle the same or to pay the Assured the indemnity provided for in Condition A hereof.

"Condition F. No action shall lie against the Company to recover for any loss under this Policy unless it shall be brought by the Assured for loss actually sustained and paid in money by the Assured in satisfaction of a judgment after trial of the issue; nor unless such action is brought within ninety (90) days after such judgment, by a court of last resort, against the Assured has been so paid and satisfied. The Company does not prejudice by this condition any defenses to such action it may be entitled to make under this Policy."

The defendant based its only defense on alleged non-compliance by the plaintiffs with the requirements of Condition C and Condition F.

The material evidence is described in the opinion. The defendant asked the Chief Justice to make the following rulings:

"1. Upon all the evidence and pleadings in this case, the plaintiffs are not entitled to recover.

"2. If the jury find that the plaintiffs are entitled to recover they cannot recover a sum greater than the amount actually paid by the plaintiffs in satisfaction of a judgment with interest from the date of the writ in this action, and in no event can the plaintiffs recover in this action a sum greater than \$5,000.

"3. The court instructs the jury that if the jury shall find that the plaintiffs are entitled to recover in this action, there can be no recovery beyond the sum of \$5,000."

The Chief Justice refused to make these rulings and submitted the case to the jury without referring in his charge to Condition F of the policy. The jury returned a verdict for the plaintiff in the sum of \$5,000 with interest at six per cent, amounting to \$5,675; and the defendant alleged exceptions.

The case was submitted on briefs.

E. I. Taylor & J. W. Britton, for the defendant.

D. H. Coakley & J. G. Walsh, for the plaintiffs.

BRALEY, J. By the terms of the policy the plaintiffs as the assured were bound under Condition C to give immediately written notice of the accident, either to the home office of the company or to its authorized agent, "with the fullest information available at the time." *Rooney v. Maryland Casualty Co.* 184 Mass. 26. It was urgently insisted at the trial, that the plaintiffs had failed to comply with this requirement. But, whether seasonable notice with all available particulars had been given, was a question of fact on the evidence, which properly was submitted to the jury. *Greenough v. Phoenix Ins. Co.* 206 Mass. 247, 249.

The verdict having disposed of that ground of defense, the defendant relies on the failure of the plaintiffs to comply with the terms of Condition F in bar of their right of recovery. *Lamson Consolidated Store Service Co. v. Prudential Fire Ins. Co.* 171 Mass. 433, 435. This clause provides, that "No action shall lie against the Company to recover for any loss under this Policy unless it shall be brought by the Assured for loss actually sustained and paid in money by the Assured in satisfaction of a judgment after trial of the issue; nor unless such action is brought within ninety (90) days after such judgment, by a court of last resort, against the Assured has been so paid and satisfied. The Company does not prejudice by this condition any defenses to such action it may be entitled to make under this Policy." But under Condition D it was obliged at its own cost to defend the action in the name and behalf of the plaintiffs, unless the company elected to settle, or to pay the assured the full amount of the indemnity stipulated. This condition was inserted for its own benefit. It does not contend that, as required by Condition D, the notice received from counsel for the person injured, and the summons served upon them in the action of tort

which followed, were not promptly transmitted by the plaintiffs to its duly authorized attorney, who entered an appearance and filed an answer. The plaintiffs having complied with all precedent conditions, and the defendant not having exercised the option of paying the indemnity, leaving them to make such defense or settlement as they might be advised, it absolutely controlled the suit, and the situation. It either could defend or compromise as it might determine. *Nesson v. United States Casualty Co.* 201 Mass. 71, 73. It is true the defendant's "attorney in charge" states in a letter to the plaintiffs, that the entry of an appearance and filing of an answer were for the purpose of avoiding a default, with a reservation of all the company's rights under the policy, and "that if it shall appear that we have been prejudiced by your failure to duly notify us of the accident we desire to retain the right to withdraw our defense of said action." It is likewise true that subsequently the "writ" with a copy of the declaration and answer were returned to the plaintiffs with a statement by the defendant's counsel, that, having been prejudiced by the failure of the plaintiffs to give notice, the company declined to defend the case, or to "assume your liability." But the jury has settled this assumption adversely to the defendant, and the condition in question is to be read and applied accordingly. *Young v. Hayes*, 212 Mass. 525, 533. The record recites, that, after the defendant's counsel had withdrawn, the plaintiffs, who did not contest the question of liability, were defaulted, and that, damages having been assessed by a jury, they have satisfied the execution which issued on the judgment.

The defendant's first contention, that the judgment was not rendered by a court of last resort, cannot be sustained. The Superior Court had original and exclusive jurisdiction of the action. R. L. c. 157, § 3. It had full authority to order and to enter judgment for damages, assessed either upon default or after trial of the issues. R. L. c. 173, § 109; c. 177, §§ 1, 4. *Dalton-Ingersoll Co. v. Fiske*, 175 Mass. 15. *Bailey v. Edmundson*, 168 Mass. 297. And the limitation, that if the assured satisfies the judgment he must sue on the policy within ninety days "after such judgment by a court of last resort" has been so paid, necessarily refers to the judgment terminating the litigation entered by a court having jurisdiction of the cause and the parties.

The second contention is, that the loss was not sustained and paid in satisfaction of a judgment obtained after a trial of the issue of the plaintiffs' liability. The defendant's withdrawal, however, was conditional. It rested upon the plaintiffs' failure to give the notice. But, as the notice had been duly given and received, it had assumed the defense. The plaintiffs, therefore, who were not in default, had the right to treat what the company had done as an election to undertake the defense in accordance with its express promise found in Condition D. *O'Connell v. New York, New Haven, & Hartford Railroad*, 187 Mass. 272, 278. If it had performed that which it engaged and undertook to perform, the plaintiffs would have received the full benefit and protection of the indemnity bargained for, and for which they paid the "estimated premium." It cannot repudiate the contract in part and rely upon it in part, or insist upon a condition precedent the non-performance of which has been caused by itself. *Brown v. Henry*, 172 Mass. 559, 567, 568. *Young v. Hunter*, 6 N. Y. 203, 207.

The defendant's primary position in avoidance of liability was taken deliberately under the advice of counsel, and it should not be permitted to set up its own mistaken and unjustifiable conduct as having worked a forfeiture of the policy. *Lowe v. Harwood*, 139 Mass. 133. *Beharrell v. Quimby*, 162 Mass. 571, 574, 575. *Whitten v. New England Live Stock Ins. Co.* 165 Mass. 343. *Barrie v. Quinby*, 206 Mass. 259, 268. *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234.

It follows from the views expressed, which have the sanction of a majority of the court, that the presiding judge rightly denied the first request for a ruling that the plaintiffs could not recover; and the exceptions to the refusal to rule that the plaintiffs were not entitled to interest, but were limited to the amount specified in Condition A for loss from an accident resulting in bodily injuries to one person, not having been argued, are to be treated as waived.

Exceptions overruled.

ANTONIO IBANEZ vs. JAMES O. WINSTON & others.

Berkshire. September 8, 1914. — September 9, 1914.

Present: RUGG, C. J., LORING, SHELDON, DE COURCY, & CROSBY, JJ.

Practice, Civil, Judge's charge. *Evidence*, Presumptions and burden of proof.

- In an action by an employee for personal injuries against four persons, alleged to be copartners doing business under a certain firm name, the judge, in instructing the jury that the plaintiff must prove that he was employed by the four persons named as defendants, used the following language: "The mere fact that the defendants are described in the writ as copartners under such a name is not sufficient; the reading of the writ is not sufficient; but you have to weigh all the evidence in the case and say whether you can infer that the defendants . . . in this case engaged in business under this business name as copartners." The defendants excepted. *Held*, that the exception must be sustained, as the jury naturally would assume from the language used that the description in the writ was some evidence that the defendants were copartners, whereas, if the judge chose to mention the description in the writ, he should have instructed the jury plainly that it was not evidence at all.

TORT for personal injuries against four defendants, who were described in the writ as copartners doing business under the firm name of Winston and Company, the declaration alleging that the plaintiff was employed by the defendants as a day laborer in the digging of a ditch leading from the Farnam Dam, so called, in the town of Lenox, and that he was injured by the falling or caving in of the gravel and stones on one side of the ditch by reason of the alleged negligence of the defendants. Writ dated September 6, 1912.

In the Superior Court the case was tried before *Hardy, J.* The jury returned a verdict for the plaintiff, and the defendants presented for allowance certain exceptions, which were disallowed by the judge. The defendants filed a petition for the allowance of exceptions, which was heard by a commissioner appointed by this court, who made a report.

The exceptions, being allowed by this court, raised, among other questions, the one which is stated and considered in the opinion.

The case was submitted on briefs.

W. F. Hawkins, H. J. Ryan & W. C. Kellogg, for the defendants.
J. A. Baker & I. H. Gamwell, for the plaintiff.

RUGG, C. J. It was incumbent on the plaintiff to show at the trial that he was employed by the four persons named as defendants unless that fact was admitted or waived. There was sufficient evidence (which need not be recited) to require the submission of this question to the jury, so far as it remained an issue, in view of the defendants' answer setting up a written contract of release given by the plaintiff to the defendants and introduced in evidence. *Murphy v. Fred T. Ley & Co.* 210 Mass. 371, *Norris v. Anthony*, 193 Mass. 225, and *Bagley v. Wonderland Co.* 205 Mass. 238, are decisive in the plaintiff's favor in this respect. But in the charge upon this point it was said: "The mere fact that the defendants are described in the writ as copartners under such a name is not sufficient; the reading of the writ is not sufficient; but you have to weigh all the evidence in the case and say whether you can infer that the defendants were so far connected with this plaintiff that you can infer that they were the defendants in this case engaged in business under this business name as copartners." The defendants excepted to this part of the charge. The jury naturally would assume from these words that the description in the writ was some evidence that there was a copartnership, although not enough to establish the fact without corroboration. Of course the writ was not evidence at all, and if any reference was to be made to it in that connection the jury should have been instructed plainly to that effect.

Other exceptions present questions which are not likely to arise in the same form at a new trial, and it is not necessary to consider them.

Petition to establish exceptions allowed.
Exceptions sustained.

ELENOR M. NUNN vs. ABIGAIL M. EHLERT.

Middlesex. January 26, 1914. — September 10, 1914.

Present: RUGG, C. J., LORING, SHELDON, DE COURCY, & CROSBY, JJ.

Will, Attestation. *Witness*, Attestation of will.

Under R. L. c. 135, § 1, a will is not attested lawfully by a subscribing witness, if the person who intended and attempted to execute the instrument as his will concealed his signature from the subscribing witness so that he could not see it or know that it was there.

LORING, J. This appeal from a decree of the Probate Court comes before us upon a report by a single justice of this court * which sets forth all the evidence introduced before him. The single justice found that the testimony of each subscribing witness was "entirely credible and not open to doubt," and made a finding that the instrument was properly executed and that it ought to be admitted to probate as the will of Thomas Nunn. By the terms of the report, if the finding was wrong the decree of the Probate Court (disallowing the will) is to be affirmed. But, if the finding is sustained, that decree is to be reversed and a decree entered admitting the instrument to probate.

A facsimile of the will is made part of the report. The will was written on ordinary foolscap paper, that is to say, on paper folded at the top and with lines ruled upon it. The whole paper is in the handwriting of the deceased. A copy of the ending of it is set forth in the footnote.† The *in testimonium* clause begins at the foot of the first page and ends on the second line of the

* *Braley, J.*

† "In testimony whereof I hereunto set my hand and in the presence of three witnesses declare this to be my last will and testament, this first day of March A.D. 1908 Thomas Nunn of Malden in the said Commonwealth.

"On this first day of March 1908. Thomas Nunn of Malden in said Commonwealth, sign the foregoing instrument in our presence, declaring it to be his last will, and as witnesses thereof we three at his request and in his presence hereto subscribe our names:

Signed. Thomas Nunn

Mrs. Mary E. Marshall.

John Marshall.

Thomas G. Andrews

Thomas Nunn."

second page. The attestation clause begins on the next line and fills five lines and a part of the sixth line. On the next line below and on the right hand side of that line occur the words "Signed. Thomas Nunn." On the three lines next below that line and on the left hand side of those lines are the names, "Mrs. Mary E. Marshall, John Marshall, Thomas G. Andrews." On the same line with "Thomas G. Andrews" and on the right hand side of that line are the words "Thomas Nunn."

According to Mrs. Marshall's testimony it appeared that a few days before she and her husband signed the instrument here in question the deceased had asked her if she and her husband would sign his will; that later on, he came into their kitchen and took the will out of his pocket; that "it was folded up;" that as he turned it over she saw handwriting on it and recognized the writing as the writing of the deceased, but could not "recognize any word;" that they were sitting on opposite sides of a table, and the deceased "reached" the folded paper across to her and she signed; that he held on to the paper while she signed; that it was folded "just so I could sign comfortably," and so that she saw nothing above where she put her name. She saw no signature below the edge made by the folding of the paper. She further testified that she then got up out of the chair in which she sat while signing her name; that her husband sat down and signed his name, and that the deceased held on to the paper folded as above described until both had signed. He then blotted the signatures, put the paper in his pocket and went away. She further testified that when she caught sight of the writing while the paper was being turned over she did not distinguish any words or see any signature. This testimony was corroborated by that of her husband. He was explicit in his testimony that no change was made in the arrangement of the paper while his wife and he signed, and that the deceased did not point to any signature in the will. In his testimony he said, "I don't remember of seeing any signature." It should be added that after his death the instrument now presented as the will of the deceased was found in his box in a safety deposit vault.

This case, therefore, presents the question whether a will is duly attested when the signature of the deceased is hidden from the witnesses when they attest and subscribe the will.

Our statute of wills (in substance a re-enactment of the statute of frauds, St. 29 Car. II, c. 3, § 5,*) is in these words: "Every person of full age and sound mind may by his last will in writing, signed by him or by a person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses, dispose of his property, real and personal," with some additions not necessary to be stated. R. L. c. 135, § 1.

In *Chase v. Kittredge*, 11 Allen, 49, 63, a statement was made of the meaning of the word "attested" in what is now R. L. c. 135, § 1. The decision in *Chase v. Kittredge* was that a subscribing witness cannot sign before the testator has signed. In making that decision Mr. Justice Gray delivered an exhaustive opinion upon the acts required by statute to make a valid will. In the course of that opinion he said: "The statute not only requires them (the witnesses) to attest, but to subscribe. It is not sufficient for the witnesses to be called upon to witness the testator's signature, or to stand by while he makes or acknowledges it, and be prepared to testify afterwards to his sanity and due execution of the instrument, but they must subscribe. This subscription is the evidence of their previous attestation, and to preserve the proof of that attestation in case of their death or absence when after the testator's death the will shall be presented for probate. It is as difficult to see how they can subscribe in proof of their attestation before they have attested, as it is to see how they can attest before the signature of the testator has made it his written will." Chief Justice Robertson gave a similar definition of the word "attest" in *Swift v. Wiley*, 1 B. Mon. 114, 117. He said: "To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and

* St. 29 Car. II, c. 3, § 5, is as follows: "From and after the said four and twentieth day of June all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

different ends. Attestation is the act of the senses, subscription is the act of the hand; the one is mental, the other mechanical, and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication: but to subscribe a paper published as a will, is only to write on the same paper the names of the witnesses, for the sole purpose of identification." See in this connection *Reed v. Watson*, 27 Ind. 443, 447; *Gerrish v. Nason*, 22 Maine, 438, 441; *Brooks v. Barrett*, 7 Pick. 94, 98.

If, however, the matter were *res integra*, the conclusion reached in the cases cited above would be the conclusion which would have to be reached by a due construction of the statute of wills. R. L. c. 135, § 1. The statute requires that the deceased shall be a person of full age and sound mind, that his will shall be reduced to writing, and that the writing shall be signed by him (or by a person in his presence and by his express direction), and that it shall be "attested and subscribed in his presence by three or more competent witnesses." The subscription of the paper by the witnesses identifies the instrument. What then does the statute mean when it requires in addition that the instrument shall be "attested" by the witnesses? To attest means to bear witness. When the statute requires that the witnesses shall attest, what is it that they are to bear witness to? Plainly to those facts to which they have to testify when put on the stand as attesting witnesses, namely, that those things existed and were done which the statute requires must exist and be done to make the writing a valid will. The rule that the will must be proved by the attesting witnesses, if they can be produced (as to which see *Chase v. Lincoln*, 3 Mass. 236; *O'Connell v. Dow*, 182 Mass. 541), is founded on this assumption. In *Chase v. Lincoln*, *ubi supra*, this court said at page 237: "The Legislature, in requiring three subscribing witnesses to a will, did not contemplate the mere formality of signing their names. An idiot might do this. These witnesses are placed round the testator to ascertain and judge of his capacity, and the heir has a right to insist on the testimony of all the three witnesses, to be given to the jury. They must therefore all be produced, if living, and under the power of the court."

Taken literally, R. L. c. 135, § 1, requires that the instrument

in writing shall be "signed" by the deceased (or by a person in his presence and by his express direction), in the presence of the witnesses. But as matter of construction it was early established that an acknowledgment by the deceased in the presence of the witnesses of a previous signature was equivalent to signing the instrument in their presence. Chief Justice Shaw, in his charge to the jury in *Hall v. Hall*, set forth in 17 Pick. 373, 375 (and quoted in full on this point later on in this opinion), made a statement in substance to that effect. In *Dewey v. Dewey*, 1 Met. 349, 352, Mr. Justice Dewey said: "The term 'attested,' as used in the statute, does not import that it is requisite that the witnesses should see the very act of signing by the testator. The acknowledgment by the testator, that the name signed to the instrument is his, accompanied with a request that the person should attest as a witness, is clearly sufficient." Gray, J., in *Chase v. Kittredge*, *ubi supra*, said: "The statute requires that the will shall 'be in writing and signed by the testator,' and shall be 'attested and subscribed, in the presence of the testator, by three or more competent witnesses.' He is not required to write his signature in their presence, but it is his will which they are to attest and subscribe. It must be his will in writing, though he need not declare it to be such. It must therefore be signed by him before it can be attested by the witnesses. He must either sign in their presence, or acknowledge his signature to them, before they can attest it." And the law is settled to the same effect in other jurisdictions. A collection of cases may be found in a note in 38 L. R. A. (N. S.) 164.

It may be taken to be settled, therefore, first, that the attestation required by R. L. c. 135, § 1, consists in the witnesses seeing that those things exist and are done which the statute requires must exist or be done to make the written instrument in law the will of the deceased; second, that although the act required by R. L. c. 135, § 1, is that the will shall be "signed" by the deceased, yet as matter of construction an acknowledgment by the deceased of a previous signature, made in the presence of the attesting witnesses, is equivalent to signing in their presence.

With these two propositions established we come to the question presented in the case at bar, namely: Is there an acknowledgment by the deceased of a previous signature where the signa-

ture at the time is hidden from the witnesses? Chief Justice Shaw put that (the case of a hidden signature) as an example of an instance where without question there was not an acknowledgment by the deceased of his signature. In his charge to the jury, set forth in *Hall v. Hall*, 17 Pick. 373, 375, already referred to, he said: "That to maintain the issue on the part of the executor, and to establish the will, it was necessary to prove that the testatrix signed the will in presence of the witnesses; or that she acknowledged the signature as hers in their presence; and that they severally signed it as witnesses in her presence; and that such acknowledgment was a sufficient compliance with the statute. But in the latter case such acknowledgment may be shown, either by proof of an express acknowledgment and declaration that the signature to the will is hers, or by such facts as will satisfy the jury, that she intended to make such declaration or recognition of her signature. If a mere reference is made to a paper, especially if produced by another person, and not held in her own custody, or if it is folded up, and there is no pointing to or referring to the signature, if she publishes, declares and acknowledges such document to be her will, this is not such an acknowledgment of the signature as will supersede the necessity of an actual signature in the presence of the witnesses, and will not warrant the jury in finding that it was duly signed in the presence of the witnesses." And the law is settled in accordance with this view in England (*Hudson v. Parker*, 1 Rob. (Eccl.) 14; *Blake v. Blake*, 7 P. D. 102); in New York (*In re Will of Mackay*, 110 N. Y. 611; *In re Laudy*, 148 N. Y. 403); in Minnesota (*Tobin v. Haack*, 79 Minn. 101); and in Oregon (*Richardson v. Orth*, 40 Ore. 252). An opposite conclusion was reached in *In re Dougherty's estate*, 168 Mich. 281.

Apart from authority it is manifest that a person does not acknowledge a signature to be his where no signature can be seen. All that he does in such a case is to acknowledge the fact that he has signed. While an acknowledgment of a signature then exhibited to the witnesses is equivalent to signing in their presence, an acknowledgment to the witnesses of the fact that a signature has been made is not the equivalent of signing in their presence. It follows that where the signature is hidden there is not the equivalent of the statutory requirement that

the writing shall be "signed" in the presence of the attesting witnesses.

It is true that *Hudson v. Parker*, 1 Rob. (Eccl.) 14, and *Blake v. Blake*, 7 P. D. 102, were decided under St. 1 Vict. c. 26, § 9, * which in terms requires that the signature shall be "made or acknowledged by the testator in the presence of two or more witnesses." But it is of no consequence whether the conclusion (that the signature must be made by the testator in the presence of the witnesses or acknowledged by him in their presence) is reached as matter of construction (as in R. L. c. 135, § 1) or as matter of express enactment (as it is under 1 Vict. c. 26, § 9). The conclusion, however reached, being the same, cases in both jurisdictions are equally in point.

It is the contention of the proponent that however this question might have been decided if the matter had been *res integra*, the point is concluded by the case of *Dewey v. Dewey*, 1 Met. 349. It will be necessary to examine that case with some particularity. The instrument propounded in that case as the will of the deceased (Timothy Dewey by name) was subscribed by Medad Fowler, Josiah Fowler and Silas Root as witnesses. There was no question as to the sufficiency of the attestation on the part of Silas Root. The question presented in that case was that of the sufficiency of the attestation by Medad and Josiah Fowler. Medad Fowler testified that his name, which was upon the will, "appeared to be his handwriting, but that he had 'no recollection anything about it.'" His son, Josiah Fowler, testified that the deceased asked him and his father to sign a paper which he called his will, "and not to read it." He "thought he did not see . . . Timothy sign it; but the deponent and his father signed it as witnesses, without reading it. Deponent did not recollect seeing a word of writing on the paper, which he 'thought,' at the time, was not right, or as it should be.'" At the trial, after

* St. 1 Vict. c. 26, § 9, is as follows: "And be it further enacted, That no will shall be valid unless it shall be in writing and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

the testimony of the subscribing witnesses had been given, the case was taken from the jury and by agreement of the parties was left to the determination of the full court. The opinion begins in these words: "The only question raised in this case is whether this will was duly attested," and ends with these: "It seems to us, upon the whole evidence, that the will was duly signed by the testator, and being thus signed, he by his acts, if not by his declarations, sufficiently recognized and acknowledged his own execution of it to authorize the three witnesses to attest and subscribe the same as witnesses thereto, in accordance with the provisions of the statute."

There was no suggestion that the signature of the deceased was hidden from Medad and Josiah Fowler when they subscribed the will as witnesses. The case at bar, therefore, is not concluded by the decision made in *Dewey v. Dewey*. Not only is that true, but there is nothing in the opinion which is decisive of this case. When Mr. Justice Dewey said that the deceased "by his acts, if not by his declarations, sufficiently recognized and acknowledged his own execution of" the will, he must be taken to have meant that the deceased, by his acts, if not by his declarations, sufficiently recognized and acknowledged the previous signature made by him. In an earlier part of his opinion Mr. Justice Dewey had said: "The term 'attested,' as used in the statute, does not import that it is requisite that the witnesses should see the very act of signing by the testator. The acknowledgment by the testator, that the name signed to the instrument is his, accompanied with a request that the person should attest as a witness, is clearly sufficient. *Stonehouse v. Evelyn*, 3. P. Wms. 252, 254. *Grayson v. Atkinson*, 2 Ves. Sen. 454, 456. So a declaration by a testator, before the witnesses, that the paper is his will, is sufficient to authorize their attestation to it, and to make it a good will." A declaration by the testator that a paper bearing his signature then exhibited to the witnesses is his will is a sufficient acknowledgment of the signature to authorize the attestation of the will. That was the case to which Mr. Justice Dewey's statement was addressed. Whether such a declaration will be sufficient if the signature was hidden from the witnesses was not before the court in *Dewey v. Dewey*; and what was said there cannot be taken to have been said with reference to such a case.

There is one point on which the decision in *Dewey v. Dewey* is not clear, and that is the view which the court should be held to have taken with respect to the testimony of Josiah Fowler. Josiah Fowler did not testify that he did not see the signature of the deceased when he and his father signed as subscribing witnesses. What he did testify to was that he "did not recollect seeing a word of writing on the paper." The distinction is plain. As Mr. Justice Dewey said on pages 353 and 354: "The question is not whether this witness [he was then speaking of Medad Fowler] now recollects the circumstance of the attestation, and can state it as a matter within his memory. . . . The real question is, whether the witness did in fact properly attest it [the will]." It is what was done in fact which is to be looked to in determining whether the attestation is good or not. Testimony of a witness given at the time that the instrument is offered for probate that he does not recollect that a certain act was done, is a different thing from testimony that that act was not done. In *Dewey v. Dewey* the full court were finding the facts as well as ruling upon the law. Whether they intended to find that, although Josiah Fowler did not recollect seeing the signature of the deceased, that signature was seen by him and his father, Medad Fowler, or whether the full court meant to find that the signature was not in fact seen by either of them, is not clear. Of these two it is not necessary to determine which is to be taken to have been the view of the court in *Dewey v. Dewey*. Whichever is the true view of that opinion it is not decisive of the question which has to be decided here. The court could have found that Medad and Josiah saw the signature of the deceased but did not recollect that fact when they testified; or, if they found that Medad and Josiah did not see it, there is authority for the proposition that where the testator exhibits his signature to the witnesses and asks them to subscribe their names as witnesses the attestation is valid because he has in fact acknowledged his signature to those witnesses, even though the witnesses did not in fact see it. In such a case he has exhibited his signature to them, and that, coupled with a request that they should sign as witnesses, is an acknowledgment of his signature. In such a case it is not necessary that the signature exhibited to them by the testator should have been seen by the witnesses. That was the ground on which

Blake v. Blake, 7 P. D. 102, was decided by the Court of Appeals in 1882. It was there said that it is enough that the signature which was acknowledged could have been seen by the witnesses. That is vital. Whether it was in fact seen by them is not a matter which is decisive.

Cases like *Ela v. Edwards*, 16 Gray, 91, where it is held that a will can be allowed on proof of the authenticity of the signatures of the deceased and of the attesting witnesses when these witnesses are all dead or for any other reason cannot be produced, do not conflict with the conclusion reached by us in the case at bar. These are not cases holding that the ultimate fact to be proved is not a signing by the deceased or the acknowledgment by him of a previous signature then exhibited to the witnesses. They are cases deciding how that fact may be proved when the attesting witnesses are dead, or for other reasons cannot testify; and they decide that in such cases the ultimate fact to be proved may be proved by circumstantial evidence aided by the doctrine "*omnia rite esse acta praesumuntur*."

Another case relied upon by the proponent is *Meads v. Earle*, 205 Mass. 553. That case came before this court upon a report from which it appeared that the instrument propounded as her will was written by the deceased (who was a school teacher) without advice. It was not signed in the usual place between the attestation clause and the *in testimonium* clause, but the single justice found as a fact that the deceased, when she wrote her name at the head of the blank, intended that to be her signature to the will. It was also found by the single justice that the deceased "by words and conduct acknowledged and declared the will before the subscribing witnesses and that the subscribing witnesses signed the attestation clause in her presence at her request and upon her acknowledgment and declaration that it was her will, although neither of them saw her signature." In the opinion of the court in that case it was said: "The will was therefore properly signed. *Lemayne v. Stanley*, 3 Lev. 1. And the signature was properly attested. *Dewey v. Dewey*, 1 Met. 349, and cases cited. *Adams v. Field*, 21 Vt. 256." Nothing further was said as to the validity of the attestation. Whether there was or was not a valid attestation of that will does not seem to have been an issue which was tried before the single justice, and it is certain,

from an examination of the brief presented by the contestant to the full court, that no question on that point was made here. The only objection to the will made by the contestant in his argument before the full court was to the finding of the single justice that when the deceased wrote her name at the head of the will she intended that to be her signature to the will. No other attack upon the validity of the execution of the will was made before this court.

The proponent also has relied upon *Gould v. Chicago Theological Seminary*, 189 Ill. 282. That was a case where the attestation was held valid although the previous signature of the deceased was hidden from the subscribing witnesses when the deceased asked them to sign, saying that the paper was his will. But the Illinois act (Ill. Rev. Sts. c. 148, § 2) does not provide that the testator shall acknowledge a previous signature. The Illinois act provides that the attesting witnesses must declare on oath "that they were present and saw the testator or testatrix sign said will, testament or codicil, in their presence, or acknowledged the same to be his or her act and deed." It was held as matter of construction of that statute that what is to be acknowledged by the deceased is that the paper signed by the subscribing witnesses is his will.

It is hard to understand what the attestation of a will consists in if the contention of the proponent is right. The subscription of the witnesses identifies the paper. But the statute in requiring that the will must be "attested" means that something more must be done than the identification of the paper by the subscribing of the witnesses. It cannot be that the requirement that the will should be "attested" means that the testator shall inform the witnesses that the paper is his will. The contrary is settled law, at least in this Commonwealth. *Hogan v. Grosvenor*, 10 Met. 54. *Osborn v. Cook*, 11 Cush. 532. *Tilden v. Tilden*, 13 Gray, 110. If the subscribing witnesses need not know that the paper subscribed by them is the will of the deceased it is hard to understand what is required by the word "attested" in addition to the word "subscribed," if the definition of "attested" given in *Chase v. Kittredge* and the other cases cited above is not correct. On this point the argument of the proponent has given us no aid.

It follows that when the deceased hides from the subscribing witnesses the signature which is upon the instrument previously signed by him and goes no further than to ask the subscribing witnesses to sign the paper placed before them, even if that request be accompanied by a statement that the paper is his will, there is no acknowledgment by the deceased of his signature and so no valid attestation of his signature by the subscribing witnesses. All that is acknowledged by the deceased in that case is that the paper is his will. In such a case there is no acknowledgment by the deceased that the signature on the paper (if there be a signature upon it) is his signature. We are of opinion that the charge of Chief Justice Shaw in *Hall v. Hall*, 17 Pick. 373, set forth above, and the decisions made in *Hudson v. Parker*, 1 Rob. (Eccl.) 14, *Blake v. Blake*, 7 P. D. 102, *In re Will of Mackay*, 110 N. Y. 611, *In re Laudy*, 148 N. Y. 403, *Tobin v. Haack*, 79 Minn. 101, and *Richardson v. Orth*, 49 Ore. 252, are correct. It follows that there was no valid attestation of the will of Thomas Nunn in the case at bar.

It is undoubtedly the fact that Thomas Nunn thought that he had made his will, and it is a matter of regret, under these circumstances, to have to come to the conclusion that the paper which he signed, thinking that it was his will, is not in law his will. But that regret arises in every case in which a deceased person has failed to comply with those requirements, which, as a matter of public policy, the Legislature has thought proper to exact in case a person wishes to dispose of his property by will. The Legislature might have provided (as it has been held that the Legislature of Illinois did provide) that if the paper was signed by the deceased it would be enough if he acknowledged it to be his will in the presence of the persons who signed the paper as witnesses. But that is not the provision which was adopted in R. L. c. 135, § 1, and the earlier acts of which this is the re-enactment.

It follows that by the terms of the report the decree of the Probate Court must be affirmed. It is

So ordered.

F. T. Hammond, for the appellee.

F. O. White & R. W. Nason, for the appellant.

ABBIE A. RECORD vs. LORING W. LITTLEFIELD, executor.

Norfolk. March 11, 1914. — September 10, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & CROSBY, JJ.

Assignment. Husband and Wife. Agency, Scope of authority. Broker. Estoppel. Frauds, Statute of.

Where in a suit in equity to compel the specific performance of a contract in writing, alleged to have been signed in behalf of the defendant, to convey certain land to the plaintiff, who was a married woman, it appeared that the contract provided for a sale and conveyance to the plaintiff's husband, and where throughout the trial of the case the plaintiff was recognized by the defendant as being the assignee of the contract, she was treated by this court as having the same rights under the contract that her husband had.

Where a real estate broker, who has been employed by a landowner to sell the land on certain terms, reports to his principal by telephone that a purchaser who will agree to those terms has been found, whereupon the principal says "It is all right; go ahead," this does not give the broker authority to make a contract in writing on those terms in the principal's behalf which will bind him under the statute of frauds.

Authority given by a landowner to a real estate broker to sell a farm for \$7,000, of which \$500 is to be paid in cash and the balance by a note secured by a mortgage on the property, does not estop the landowner from showing, in a suit brought against him for the specific performance of a contract in writing to convey the farm signed by the broker, that the broker had no authority to agree in his behalf to accept the purchaser's promissory note for a part of the \$500 to be paid in cash.

BILL IN EQUITY, filed in the Superior Court on January 17, 1913, to enforce specifically the performance of a contract in writing for the sale and conveyance by the defendant to the plaintiff of certain real estate on the north side of High Street in the town of Avon called the Littlefield Farm, the contract being signed "Henry T. Anglin, Agent," and being alleged to have been made in behalf of the defendant and with his authority.

The contract in writing sought to be enforced purported to have been made with Sanford P. Record, who was the plaintiff's husband. It was as follows:

"Brockton, Mass., October 10, 1912.

"Received of S. P. Record, two hundred (\$200) dollars as deposit on purchase of the L. G. Littlefield Farm on the North side of High Street in Avon, Mass.

"Purchase price seven thousand dollars (\$7000).

"Five hundred (\$500) dollars in cash (of which this deposit is a part) on delivery of deed and mortgage back for sixty-five hundred (\$6500) dollars to run for two years at 6% per annum, with the privilege of paying the whole or any part (at option of mortgagor) at any previous time.

"Property at time of passing title to be free and clear of all encumbrance.

"It is hereby agreed that of the three hundred (\$300) dollars in cash one hundred and forty (\$140) dollars is to go as credit to said Record on a/c of commission and the balance of one hundred and sixty (\$160) dollars shall be taken in the form of a three months' note payable to Henry T. Anglin, with the privilege of making payments of the whole or any part at any time before its due date.

"It is also agreed that the said Anglin will not put said note in any Bank for discount.

Henry T. Anglin,
Agent."

In the Superior Court the case was heard by *Lawton, J.* The evidence was reported by a commissioner appointed under Equity Rule 35. The material facts shown by the report are stated in the opinion. The judge made the following memorandum: "The contract set out in the second paragraph of the bill was signed not by the defendant but by Henry T. Anglin, Agent, and I am satisfied that the defendant authorized the signing of said contract. The plaintiff has performed her part of the contract and is entitled to a decree in accordance with the second prayer of her bill." The second prayer in the bill was that the defendant might be ordered to execute and deliver to the plaintiff a deed in proper form of the premises described in the bill.

A final decree was entered which ordered a specific performance of the contract; and the defendant appealed.

C. N. Barney, (H. A. Murphy with him,) for the defendant.

C. M. Ludden, for the plaintiff, submitted a brief.

BRALEY, J. The plaintiff is a stranger to the contract of which specific performance is asked. But, having been recognized by the defendant as if she were the assignee, her rights are the same

as those of her husband, whose name alone appears as the proposed purchaser. *Currier v. Howard*, 14 Gray, 511. *Wass v. Mugridge*, 128 Mass. 394.

The decree rests on the finding of the judge, that the contract set out in the bill, executed by "Henry T. Anglin, Agent," had been duly authorized by the defendant. It is settled that an agent appointed by parol may make a binding contract for the sale of the real property of his principal, and, if the agent signs only his own name, the principal can be held, if upon the whole instrument the intention to bind him and not the agent personally is manifest. *Emerson v. Providence Hat Manuf. Co.* 12 Mass. 237. *Williams v. Robbins*, 16 Gray, 77. *Baker v. Hall*, 158 Mass. 361. *Ledbetter v. Walker*, 31 Ala. 175. It would follow, that, R. L. c. 74, § 1, cl. 4, 5, having been satisfied, the plaintiff, who has performed her part of the contract, would be entitled to the relief given. *Dresel v. Jordan*, 104 Mass. 407. *Slater v. Smith*, 117 Mass. 96.

But, even under the familiar rule that the conclusions of fact reached by the judge, which depend upon the credibility of witnesses and the weight of the evidence, will not be set aside unless plainly wrong, the finding cannot be sustained on the record. *Taber v. Breck*, 192 Mass. 355.

The evidence for the plaintiff leaves no doubt that the defendant authorized Anglin, a real estate broker, to find a customer who would give \$7,000 for the farm, \$500 of which was to be paid in cash and the balance secured by a mortgage on the property. It is said in *Fitzpatrick v. Gilson*, 176 Mass. 477, 478, that "when a broker has found a customer for that for which his principal has employed him to find a customer, the broker has performed his duty and has earned his commission. . . . Making or not making a contract with the customer produced, enforcing or not enforcing a contract, if made, are matters for the broker's principal to do or not to do, as his ability and inclination determine; they are matters with which the broker is not concerned, and on which his right to a commission is not dependent." The owner, however, is not precluded from going further, and the broker may be instructed and empowered orally not only to find a customer able and willing to buy, but to make a binding contract. *Shaw v. Nudd*, 8 Pick. 9. *Heard v. Pilly*, L. R. 4 Ch. 548. *Lawrence v.*

Taylor, 5 Hill, 107. The conversation held over the telephone between Anglin and the defendant shows that Anglin informed him that a purchaser on the terms stipulated had been found. But the direction then given, "It is all right; go ahead," did not include authority to make a contract in writing in accordance with the proposed terms of sale which would bind the defendant. *Lyon v. Pollock*, 99 U. S. 668. The broker furthermore never having been instructed to accept the promissory note of the purchaser in part payment of the amount required in cash, there is no contract which can be specifically enforced. *Coddington v. Goddard*, 16 Gray, 436. R. L. c. 74, § 1, cl. 4. Nor is the defendant estopped, as the plaintiff urges, from showing the limitations of the broker's authority. The plaintiff's husband was not compelled to deal with him alone. Before acceptance of the contract tendered he could have gone to the defendant and have ascertained the scope of the agency. Having failed to make any inquiry, the plaintiff cannot complain if it appears that the broker exceeded his powers. *Dodd v. Farlow*, 11 Allen, 426. *Lowell Five Cents Savings Bank v. Winchester*, 8 Allen, 109, 118, 119.

It is not contended that there is any evidence of part performance sufficient to take the case out of the statute under the third prayer of the bill. *Williams v. Carty*, 205 Mass. 396. And the evidence is insufficient to show ratification. The letters of the defendant and his attorney to Anglin, the appointment by the defendant with the plaintiff of the time and place for passing title, the period elapsing between the sale and the meeting for performance, during which the defendant apparently obtained the assent to the conveyance of other parties interested in the estate, the execution of the mortgage deed with its recital in the granting clause of a deed from the defendant to the plaintiff, and the mortgage note which had been prepared by the defendant's counsel, the testimony that the defendant said he was to receive only \$150 of the payment of \$500 which had been actually made in cash, and the taking possession of the premises by the plaintiff, while circumstances of significance, do not charge the defendant either directly or by reasonable implication with notice or knowledge of the contract which had been delivered to and retained by the plaintiff's husband, but never exhibited to the defendant. *Combs v. Scott*, 12 Allen, 493, 497. *Foster v. Rockwell*, 104 Mass.

167, 171, 172. The decree must be reversed, and the bill dismissed without costs.

Ordered accordingly.

INHABITANTS OF IPSWICH *vs.* PROPRIETORS OF JEFFRIES NECK
PASTURE & others.

CLINTON E. HOBBS *vs.* SAME.

Essex. March 12, 13, 1914. — September 10, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & CROSBY, JJ.

Ipswich. Proprietors of Jeffries Neck Pasture. Adverse Possession. Estoppel. Words, "Commoners."

In a suit in equity by the town of Ipswich against the Proprietors of Jeffries Neck Pasture, a corporation formally incorporated or reorganized under the statute now R. L. c. 123, and a certain grantee from that corporation, to set aside the deed to the defendant grantee as void under R. L. c. 123, § 14, because not authorized by a vote of two thirds in number of the right owners, a master found that the plaintiff, through a conveyance made to it in 1788 by the Commoners of Ipswich, was the present owner of certain undrawn rights, on which it should have been permitted to vote against the authorization of the deed, and that the defendant corporation had not acquired by ouster or adverse possession any title to such undrawn rights against the plaintiff. It appeared that there was no direct refusal by the defendant corporation to recognize the plaintiff as a right holder until ten years before the filing of the bill. *Held*, that the relation of the defendant corporation to the owners of the rights, who were the owners in common of the land called the Jeffries Neck Pasture, if not that of a trustee to *cestuis que trust*, was akin to that relation, so that it would be difficult to infer from equivocal acts of the defendant corporation a purpose to violate the duties arising out of that relationship by disseising or ousting any of the right owners; and on the facts reported the findings of the master were sustained and the deed in question was set aside as not authorized by a vote of two thirds in number of the right owners.

In a suit in equity by the town of Ipswich against the Proprietors of Jeffries Neck Pasture and a certain grantee from that corporation, to set aside a deed against the authorization of which the plaintiff had not been permitted to vote as the holder of rights in the defendant corporation, it was found by the master that the plaintiff was the owner of the rights in question through a conveyance made to it in 1788 by the Commoners of Ipswich. It appeared that in 1723 the Commoners of Ipswich pleaded in an action brought by a certain person that they had no right in the common land left undisposed of. The facts reported by the master showed that this plea was not true, the Com-

moners of Ipswich, besides other grants of rights, having granted two rights to the defendant corporation in 1767 and another right later. *Held*, that the defendants were not in a position to assert that the plaintiff was estopped by the plea.

RUGG, C. J. These are bills in equity * whereby the plaintiffs seek to set aside a deed made by the defendant corporation to the defendant Clark. The Proprietors of Jeffries Neck Pasture (hereafter called the Proprietors) is a corporation existing at least since about 1713 and formally incorporated or reorganized in 1837 under Rev. Sts. c. 43, now R. L. c. 123, which provides for the incorporation of owners of common lands. The plaintiff contends that it is the owner of rights in this corporation, and that the deed in question is void on the ground that its execution and delivery were not authorized by a vote of two thirds in number of the right owners as required by R. L. c. 123, § 14.

The determination of the controversy upon these points involves an examination of the history of the defendant corporation. Jeffries Neck Pasture is an outlying hill in the town of Ipswich containing about four hundred acres and used for many years as a pasture. Before 1710 it belonged to the Commoners of Ipswich who owned other lands. Between 1707 and 1710 other inhabitants of Ipswich were admitted as Commoners and an apportionment of the land was made, though not in equal proportions, among the old and new Commoners. Rights uniformly described by numbers were established, as follows: two hundred and sixty-eight old rights, two hundred and twenty-four new rights, both relating to upland, and one hundred and eight old marsh rights and one hundred and eleven new marsh rights. Originally these were represented by lots laid out in severalty and to

* The first filed in May, 1903, in the Superior Court and afterwards transferred to the Supreme Judicial Court, and the second filed in the last named court on May 20, 1903. A master found that the proceedings purporting to authorize the defendant corporation to convey its real estate to the defendant Clark were void. The defendant denied that the plaintiff town had any title to rights in the defendant corporation, and at the meeting of the right holders of the defendant corporation the plaintiff town was not allowed to vote. The master found that the town was the owner of a certain number of the rights and that less than two thirds of the known right holders voted for the sale. Both cases were reserved by *De Courcy, J.*, for determination by the full court.

some extent marked on the ground, but whatever ownership or occupation in severalty existed was slight and disappeared long ago and the right owners have conducted themselves for nearly or quite two hundred years as tenants in common and should be so considered. See *Proprietors of Jeffries Neck Pasture v. Ipswich*, 153 Mass. 42. In 1710 a list of owners was made with the numbers of the lots affixed to the names. Other lists were made in 1713, two lists in 1748-9, and one in 1837, and another by the last "pounder" or keeper of the pasture. In all the lists there are certain rights marked "undrawn." While these undrawn rights are not identical in all the lists, the master has found that there are eleven old and eighteen new rights, which are undrawn and which are equal to nineteen and sixty-four one hundredths rights out of a total of four hundred and twenty-four and forty-eight one hundredths when approximately all the rights have been reduced to terms of old rights for convenience of description. A pivotal question is the present ownership of these undrawn rights. The master * has found that it is in the plaintiff through a conveyance made to it by the Commoners in 1788. The defendant corporation claims title by adverse possession.

The salient facts upon which rests the decision of this question are these: It does not appear that either the plaintiff or its predecessor, the Commoners, actually enjoyed pasturage by virtue of undrawn rights. In 1723 the Commoners pleaded in an action brought by one Samuel Tilton that they had no rights in common land left undisposed of. The facts show that this plea was not true, and the defendants are not in a position to claim an estoppel by reason of the plea. Assuming that their votes to that end were effective, the Commoners granted two undrawn rights to two different persons in 1722 and two other such rights in 1770, the Proprietors two in 1767 and later another after conference with the Commoners' clerk to ascertain whether the grantee was entitled thereto. There was discussion from time to time touching the rights of Commoners and later of the plaintiff in the undrawn rights. The Proprietors paid obligations to its clerk and employees in pasturage, but it never was expressed to be in respect of undrawn rights and there was no relation between the value of

* Wilbur E. Rowell, Esquire.

the undrawn rights and the pasturage given for the service or debt.

"Commoners" as that word generally is used in the real estate law of the colonial and provincial history of this Commonwealth, describes those who owned undivided tracts of land as tenants in common by virtue of a grant from the government to several persons usually for purposes of settlement and the establishment of a town. *Higbee v. Rice*, 5 Mass. 344. *Attorney General v. Tarr*, 148 Mass. 309, 311. From early times they have been enabled to act as a corporation. But, as was said in *Proprietors of Monumoi Great Beach v. Rogers*, 1 Mass. 159, at page 164, "This is a species of corporation different from corporations in general. . . . The statutes take away no rights from the individuals composing such a corporation, which, as tenants in common, they had before they were incorporated, but, on the contrary, give them new powers. . . . Whenever individuals are seised, as tenants in common, in their own several rights, they are, in the manner pointed out by law, authorized to incorporate for the purposes and with the powers expressed in the statutes; and are, by such an incorporation, seised as a corporation; and that without any corporate act done." The relation between the owners of the land held in common and the corporation established by them is peculiar. The parties do not act at arms length and independent of each other. On the contrary, the owners continue in many respects to be tenants in common as to the land, while the corporation exists for the benefit of all and cannot act adversely to any of those tenants without violation of its duty to protect the interests of all.

Plainly at the beginning in 1710 and 1713 the ownership of the undrawn lots was in the Commoners. They were not granted then to the corporation known as the Proprietors. This is the starting point. There is no grant nor vote to convey to the Proprietors at any time subsequent. On the contrary, there is evidence of assumption of continued ownership by the Commoners. The votes to convey rights by the Commoners in 1722 and 1770 at least were evidence and perhaps "sufficient proof of title and seisin" and raised a presumption of sufficient seisin in the Commoners to enable them to convey and vest title in the grantee. *Gloucester v. Gaffney*, 8 Allen, 11, 13. It is argued by the defendants that

the Proprietors had no other source except the undrawn rights from which to make its grants in 1767 and to make payments to its clerk and employees. While it does not appear whence the authority to make these concessions was derived, conceivably it may have come from the temporary use of the numerous rights whose ownership has been lost sight of. At all events it is not a necessary conclusion that it arose from disseisin by the corporation of the rights of the Commoners and its successor, the plaintiff. The master has found that neither the Commoners nor the plaintiff nor the Proprietors have enjoyed pasturage of the undrawn rights at any time. While the plaintiff and Commoners have never had actual possession in the sense of receipt of rents or profits from the land by virtue of the rights or the exercise of powers of ownership such as voting, neither have the Proprietors had similar possession, and its possession of the land has been by virtue of other rights which it was bound to exercise for the benefit of all owners.

The record fails to disclose any positive act by the Proprietors which constitutes either ouster of the Commoners or the plaintiff or active possession of their rights. It is to be noted that the Proprietors as a corporation did not have independent title to the land. The corporation had seisin simply for the mutual advantages of all the tenants in common. For these reasons its conduct in respect of acquiring title by adverse possession or ousting the right owners stands on a less favorable footing than does that of tenants in common. Yet it is the general rule that possession of one tenant in common of the common estate is not adverse to his cotenants but is consistent with their title. An act to amount to dispossession or ouster must be decisive and unequivocal and evince a settled purpose to exclude the cotenant from all enjoyment of his title. Facts sufficient to show such a purpose will vary with each case and no universal test can be formulated. *Lefavour v. Homan*, 3 Allen, 354. *Bellis v. Bellis*, 122 Mass. 414. *Ingalls v. Newhall*, 139 Mass. 268. *Parker v. Proprietors of Locks & Canals*, 3 Met. 91, 99.

Springfield v. Miller, 12 Mass. 415, on which the defendants strongly rely, is distinguishable on the ground that there was an initial grant by the Commoners of an entire tract to the Proprietors. In the case at bar the Commoners made no grant

until that to the plaintiff in 1788. *Rickard v. Rickard*, 13 Pick. 251, and other like cases on which the defendants depend were cases involving rights of tenants in common and had nothing to do with a corporation of Commoners or Proprietors.

The most significant circumstance in the case at bar is that from the time of the grant by the Commoners to the plaintiff in 1788 until 1893 there was no definite and positive demand by the plaintiff in assertion of its rights. But there was not until 1893 any direct refusal by the Proprietors to recognize the plaintiff as a right owner. From time to time the plaintiff took action looking toward an investigation and assertion of its rights. The relation of the corporation known as the Proprietors to the owners in common of the land, if not that of trustee to *cestuis que trust*, is akin to that relation and it is difficult to infer from equivocal acts a purpose to violate the duties arising out of that relationship and to disseise or oust the right owner. There was no positive denial by the Proprietors of the rights of the plaintiff until 1893. There has not been time since then for adverse possession to ripen into title. In view of all these peculiar circumstances we think that the facts do not require a finding of ouster or adverse possession by the defendant corporation and that the finding of the master that the plaintiff is still a right owner was correct.

The result follows from this conclusion that the vote to sell adopted in 1896, under the authority of which the deed from the Proprietors to the defendant Clark was executed, was not passed by the votes of two thirds in number of the right owners in the Proprietors, and hence that the deed under which the defendant Clark claims was void.

It would seem also that the same consequence must ensue from the finding of the master that sixty-one and forty-three one hundredths rights (some of these being marsh rights more divided in number and possibility of ownership) out of the total of four hundred and twenty-four and forty-eight one hundredths rights have been lost sight of and the owners are unknown. Certainly facts enough are not reported respecting these rights to warrant the inference that the title to them has been acquired through ouster or adverse possession by the Proprietors.

As the deed from the Proprietors to the defendant Clark was not merely voidable but void at its inception, because not author-

ized by such a vote of the members of the defendant corporation as is required by the statute, no question of laches arises. It is not contended that the plaintiffs' right to maintain the bill is barred by the statute of limitations.

The plaintiffs are entitled to a decree setting aside the deed as a nullity and awarding them costs.

Ordered accordingly.

C. A. Sayward, for the defendants.

H. I. Bartlett, (*G. H. W. Hayes & G. A. Schofield* with him,) for the plaintiff town.

H. H. Newton, for the plaintiff Hobbs.

IRA N. KILBURN, administrator, *vs.* NEW YORK, NEW HAVEN,
AND HARTFORD RAILROAD COMPANY.

WILLIAM H. MOREHOUSE *vs.* SAME.

Hampden. June 15, 1914. — September 10, 1914.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DE COUCEY, JJ.

Negligence, On railroad track at side of highway.

If the driver of a large motor truck sees some freight cars standing on a railroad track at the side of a street several hundred feet away with no engine in sight, and, thinking that he can back the truck across the track to deliver some packages at the shipping room of a mill and get off the track before the cars will be moved in any way, he attempts to do this, but the cars are kicked down the track by a switching engine, and if by reason of the noise made by the wind and by the truck his attention is not attracted to the noise of the cars and the shouting of the brakeman and a collision occurs in which he is killed and the motor truck is injured, these facts, taken in connection with others, are evidence of the driver's due care in actions to recover for his death and for the injury to the motor truck.

If the driver of a motor truck, that was struck by freight cars kicked down by a switching engine on a railroad track at the side of a street across which he had backed his truck, had with him in the truck at the time of the accident a helper on whom to some extent he may have relied to ascertain whether there was danger in backing across the track, and if the circumstances justify a finding not only that the driver but also that the helper acted with due care, it does not matter whether the driver relied for his protection upon himself alone or whether he relied to some extent upon the helper.

TWO ACTIONS OF TORT, the first by the administrator of the estate of Frederick A. Kilburn for causing the death of the plaintiff's intestate on April 8, 1912, on South Street in Holyoke, a public highway between the buildings of the Germania Mills, at the side of which was a branch railroad track operated by the defendant, by reason of the collision of certain cars of the defendant, that were kicked down the track by a switching engine, and a large motor truck driven by the intestate from which he had delivered a package at the main building of the mills; and the second action by the owner of the motor truck for injury to the truck by the same collision. Writs dated July 2, 1912.

In the Superior Court the cases were tried together before *Aiken*, C. J. The facts that could have been found upon the evidence which are necessary to an understanding of the opinion are there stated. Payette, mentioned in the opinion, accompanied Kilburn in the motor truck as a helper. The Chief Justice refused to order a verdict for the defendant or to make certain rulings requested by the defendant, and submitted the cases to the jury. The jury returned a verdict for the plaintiff in the first case in the sum of \$5,000 and a verdict for the plaintiff in the second case in the sum of \$1,050. The Chief Justice then asked the jury whether they found "that the way across the tracks to the mill door was a way by invitation or a way by license." The foreman answered, "Invitation," and the other jurors acquiesced.

The defendant alleged exceptions.

The cases were submitted on briefs.

W. S. Robinson & E. T. Broadhurst, for the defendant.

N. P. Avery & A. S. Gaylord, for the plaintiffs.

HAMMOND, J. This is one of a large class of cases where no useful purpose is served by a detailed recital or elaborate discussion of the evidence. It has all been carefully considered, and we are of opinion that the questions, whether Kilburn, the driver of the truck, was a licensee or an invitee while entering upon the defendant's track, and whether the defendant was negligent, were clearly for the jury. The special finding that he was an invitee was justified by the evidence.

The question whether Kilburn was in the exercise of due care is close, but upon the evidence the jury properly may have found that as he drove out of the yard into South Street he looked up

the street to see whether there was any approaching train; that even if he saw the cars standing upon the track several hundred feet away there was no engine in sight, and that to a person in his situation the cars would appear to be freight cars standing for the time being upon the track and apparently not soon to be moved; that he was justified in thinking that he could back across the track and deliver at the shipping room the few articles remaining on his truck before the cars would be started by an engine or in any other way; that by reason of the noise made by the wind and the action of the truck his attention was not attracted by the noise of the cars after they started and by the shouting of the brakeman; and that in view of all these circumstances, taken in connection with the other evidence, he was in the exercise of due care even if he relied upon himself alone.

There was also evidence upon which the jury might have found that he and Payette were engaged in the same work; that to a certain extent he relied on the latter for information as to whether there was danger in backing upon the crossing, and that under all the circumstances Payette acted with due care.

In a word, the evidence justified a finding that, whether Kilburn relied upon himself alone or to any extent upon Payette, due care was exercised for his protection.

We see no error in the manner in which the presiding judge dealt with the rulings requested. In each case the order is

Exceptions overruled.

STEWART BROWNE vs. JOSEPH FAIRHALL, executor.

Essex. June 15, 1914. — September 10, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Review. Evidence, Proof of foreign law. Practice, Civil, Review.

Upon a petition under R. L. c. 193, § 22, for a writ of review, after final judgment for the defendant in an action at law, to enable the petitioner to show that by the law of another State which governed the rights of the parties the petitioner was entitled to recover, an affidavit of a notary public and counsellor at law, who is not called as a witness, giving his opinion as to the law of such other State, is not admissible in evidence, the respondent having had no opportunity to cross-examine the affiant.

A petition under R. L. c. 193, § 22, for a writ of review after final judgment is in effect a motion for a new trial after judgment and is addressed to the discretion of the trial court in which the judgment was rendered.

An appeal from an order dismissing a petition for a writ of review under R. L. c. 193, § 22, brings up only matters of law apparent on the record.

Where, in an action of contract against an executor, the presiding judge refused to rule, as requested by the defendant, that the plaintiff could not recover because the contract was one to be performed only by the defendant's testator personally and did not bind the executor, and reported the case for determination by this court, who held that the ruling should have been given and under the terms of the report ordered judgment for the defendant, the defeated plaintiff cannot maintain a petition under R. L. c. 193, § 22, for a writ of review after the judgment in order to permit him to prove at a new trial that the contract was governed by the law of another State under which it was binding on the executor; because the petitioner has had his day in court when he might have offered the evidence in regard to the foreign law but chose not to do so, and his omission to offer the evidence has not been caused by any act of the respondent. In the present case it was *said*, that, if the evidence of the foreign law which the petitioner wished to present had been brought properly before this court, which it was not, it would not have been essentially at variance with the decision of this court in regard to the effect of the contract.

BRALEY, J. By the decision in *Browne v. Fairhall*, 213 Mass. 290, when the case was first before this court on the report of the presiding judge, after a verdict for the plaintiff at a trial on the merits, judgment was ordered for the defendant on the ground that performance of the contract for breach of which the action was brought had been rendered impossible by the death of the testator. It is to be assumed that the order was followed, and thereupon the plaintiff seasonably brought this petition under R. L. c. 193, § 22, for a writ of review to vacate the judgment to enable him to present evidence at a new trial, that by the laws of the State of New York, where the petition alleges the contract to have been made and where it was to be performed, the cause of action survived. The respondent having answered to the merits admitting the allegations of fact in the petition, but claiming that they were insufficient to authorize a writ of review, the trial judge * ruled "as matter of law that this action cannot be maintained and for that reason" dismissed the petition, and the petitioner appealed.

The report in the former case formed no part of the record, and, while the petitioner's affidavit is sufficient to prove facts

* Crosby, J.

known only to himself as reasons for the issuance of an order of notice, the affidavit also filed of a notary public and counsellor at law giving his opinion as to the law of another jurisdiction was inadmissible and could not be considered, because the respondent had been given no opportunity of cross-examination. *Coolidge v. Inglee*, 13 Mass. 26, 50, 51. *Parker v. Framingham*, 8 Met. 260, 264. *Warner v. Collins*, 135 Mass. 26. *Rogers v. Hill*, 4 Mass. 349. *Gray v. Moore*, 7 Gray, 215. The record is bare of any recital of the proceedings at the hearing; and what evidence, if any, was introduced showing the foreign law cannot be ascertained. It must be assumed, however, that the case was heard on the petition and answer. The petition under § 22 is addressed to the discretion of the court in which judgment was rendered. It is in effect a motion for a new trial after judgment, and the order granting or denying it cannot be reviewed on exceptions. *Dearborn v. Mathes*, 128 Mass. 194, 196. But if rulings are made at the hearing as to the admissibility of evidence, or the jurisdiction of the court, or the law applicable to the case which could not have been raised before verdict, they can be reviewed on report or exceptions. *Dearborn v. Mathes*, *ubi supra*. *Hayes v. Collins*, 114 Mass. 54. *Weeks v. Adamson*, 106 Mass. 514. The appeal brings up only questions of law apparent on the record. *Given v. Johnson*, 213 Mass. 251, 252, and cases cited. And the refusal at the original trial to rule as the defendant requested that the contract was the personal undertaking of the testator which could not be performed by his executor, as well as the ruling that the contract survived, recited in the petition were apparently made at the close of the evidence. If the petitioner relied upon the law of a sister State as being different from our own relating to the survival of actions of contract, he was not precluded from introducing evidence in support of his contention. If such evidence had been offered but excluded, his rights could have been amply protected by the report. But if, being satisfied with the ruling that the action could be maintained under our laws, he did not deem it expedient to offer the evidence or to contend that the contract was governed by the foreign law, the omission affords no reason for granting a review. The petitioner, in other words, has had his day in court where he could have availed himself of the decisions now relied on in support of the petition, of which

opportunity he has not been deprived by any act of the respondent, and his failure to offer them in evidence is insufficient to ground a petition for review. *Dearborn v. Mathes*, 128 Mass. 194. *Ryder v. Phoenix Ins. Co.* 101 Mass. 548, 550, 551.

But, even if the second affidavit is treated as evidence before the trial judge and the report is considered as incorporated in the appeal, we do not understand that upon the facts appearing in the report the construction of the contract adopted in *Browne v. Fairhall*, 213 Mass. 290, is essentially at variance with the foreign law invoked by the petitioner. *Dexter v. Norton*, 47 N. Y. 62. *Lorillard v. Clyde*, 142 N. Y. 456, 462. *Dolan v. Rodgers*, 149 N. Y. 489, 491. *Buffalo & Lancaster Land Co. v. Bellevue Land & Improvement Co.* 165 N. Y. 247, 254.

Order dismissing petition affirmed.

The case was submitted on briefs.

R. O. Harris & W. A. Morse, for the petitioner.

C. A. Sayward, for the respondent.

COMMONWEALTH v. JACOB FOX.

Suffolk. June 15, 1914. — September 10, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Hawkers and Pedlers. Constitutional Law. Boston. Police Commissioner of Boston.

St. 1907, c. 584, § 9, providing that "the police commissioner of the city of Boston may designate from time to time certain streets, or parts of streets, or sections of the city wherein, and not elsewhere in the city, it shall be lawful on the days and within the hours specified by him, and under such general rules as he shall make, for any hawker or pedler, without the license provided for in this act, to stop or stand for the purpose of selling merchandise," is constitutional, and a regulation made by such commissioner in pursuance thereof is valid.

In deciding that St. 1907, c. 584, § 9, authorizing the police commissioner of the city of Boston to designate "certain streets, or parts of streets, or sections of the city wherein, and not elsewhere in the city, it shall be lawful on the days and within the hours specified by him, and under such general rules as he shall make, for any hawker or pedler, without the license provided for in this act, to stop or stand for the purpose of selling merchandise," is constitutional, it was said, that the words "and not elsewhere in the city" do not

demand an unqualified utter prohibition of the business of hawking and peddling in some sections, but that the statute merely provides for prohibition in the streets and sections designated during defined hours on certain days and for regulation in all other parts of the city.

RUGG, C. J. This is a complaint for the violation of regulations made by the police commissioner of Boston touching hawking and peddling on public streets in that city. The regulation in question was made under the authority of St. 1907, c. 584, § 9. * The only question raised by the defendant is whether the regulation is valid.

The police commissioner issued rules wherein he divided the city into three parts designated respectively as a "Business Section" and a "Restricted Territory" (each of which was described with definiteness) and "All parts of the City excepting the 'Business Section' and the 'Restricted Territory.'" Hours were prescribed during which the business of hawking and peddling was prohibited in the "Business Section" and allowed in a limited way in the "Restricted Territory," while in the rest of the city it was permitted "at reasonable hours subject to conditions herein prescribed." A subsequent paragraph provided that with certain exceptions not material to this complaint "no hawker or peddler . . . shall in a public street and while offering merchandise for sale remain in one place or within two hundred yards thereof for more than five minutes, unless actually engaged in selling to a purchaser. . . ." The defendant is prosecuted for violation of this regulation.

* "Section 9. The police commissioner of the city of Boston may designate from time to time certain streets, or parts of streets, or sections of the city wherein, and not elsewhere in the city, it shall be lawful on the days and within the hours specified by him, and under such general rules as he shall make, for any hawker or pedler, without the license provided for in this act, to stop or stand for the purpose of selling merchandise: provided, that such hawkers or pedlers carry on their business in conformity with the laws of the Commonwealth, the ordinances of the city, and the regulations of the board of aldermen and of the board of health of the city of Boston, now or hereafter enacted and not inconsistent herewith." In the Superior Court *Chase, J.*, refused to make two rulings requested by the defendant. It was stated in the defendant's bill of exceptions that the sole purpose of the requests was to raise the single question of the validity of the designation, rules and regulations made by the police commissioner of the city of Boston so far as they applied to this case.

There can be no doubt of the constitutionality of the section of the statute under which the regulations were made. The Legislature may delegate to a local board or officer the power to establish rules of this nature touching the conduct of a business by which the public interests in defined districts may be affected. *Commonwealth v. Plaisted*, 148 Mass. 375. *Brodvine v. Revere*, 182 Mass. 598. *Commonwealth v. Maletsky*, 203 Mass. 241, and cases there collected. Usually in this Commonwealth a town or a board composed of two or more persons has been the repository of the power to establish local ordinances and by-laws. But there is no reason in principle why a single officer may not be authorized to exercise it. *United States v. Grimaud*, 220 U. S. 506.

This is a penal statute and hence is to be construed with strictness. Yet it is to be given a reasonable interpretation so as to carry out, if possible, the purpose of the Legislature in enacting it. The regulation of hawking and peddling has been a subject for legislation for many years. *Commonwealth v. Ellis*, 158 Mass. 555. The authority conferred by this statute is to designate parts of the city where hawking and peddling may be carried on and to prescribe general rules for the conduct of the business. It is not conditioned for its exercise upon an absolute and entire prohibition of the business in other parts of the city. The prohibition during the ordinary hours of heavy street traffic in the "Business Section" and the limitations upon its conduct during the same hours in the "Restricted Territory" is within the scope of the statute. The defendant's contention that the words "and not elsewhere in the city" demand an unqualified and utter prohibition of the business in some sections is not tenable. It would narrow unduly the scope of the statute. The prohibition in the streets and places designated during defined hours of certain days and a regulation in all other parts of the city is a sufficient compliance with the statute. The purpose of this section of the statute is the salutary one of promoting the comfort and facility of travel upon highways by empowering the local officer charged with the preservation of public order to promulgate such rules respecting a class of travellers prone from the nature of their business to pause longer in one place than the convenience of their fellow travellers

might permit. Manifestly this is a purpose well within the field appropriate for ordinance or by-law. It has a tendency to prevent congestion of traffic or other disorder in a city of many narrow streets and to preserve for the reasonable use of everybody the easement of general travel. It affords some assurance that public ways may not be appropriated to the uses of private business. *Commonwealth v. Ellis*, 158 Mass. 555. *Commonwealth v. Morrison*, 197 Mass. 199.

Exceptions overruled.

The case was submitted on briefs.

J. F. Lynch, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

COMMONWEALTH vs. SAMUEL A. SEGEE.

Suffolk. June 15, 1914. — September 10, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Forgery. Forging Public Record. Evidence, Of official records, Opinion: experts, Of intent, Of motive, Of handwriting. *Practice, Criminal*, Exceptions. *Words*, "Public records."

The valuation lists of the assessors of a town are "public records" within the meaning of R. L. c. 209, § 1, which makes it a crime to forge a public record with intent to injure or defraud.

In order to constitute the crime of forging a public record with intent to injure or defraud, it is not necessary that the whole instrument should be fictitious. The forgery may consist in the material alteration of a part of a valid document, as in the present case it consisted in changes in the valuation lists of the assessors of a town.

The fraudulent alteration of the valuation lists of the assessors of a town is none the less the forging of a public record with intent to defraud under R. L. c. 209, § 1, if at the time of such alteration the lists, although they had been delivered to the collector of taxes, were not accompanied by a warrant for the collection of the taxes therein assessed.

Upon an indictment under R. L. c. 209, § 1, for forging a public record "with intent to injure or defraud" by making alterations in the valuation lists of the assessors of a town, it is not necessary, in order to convict the defendant, to show an intent to defraud a particular person. It is sufficient to prove a general intent to defraud some one.

The provision of R. L. c. 175, § 74, that copies of official records of depart-

ments of the Commonwealth or of any city or town authenticated by the attestation of the officer who has charge of them "shall be competent evidence in all cases equally with the originals thereof," does not render the originals themselves incompetent as evidence.

At the trial of an indictment under R. L. c. 209, § 1, for forging alterations in a public record with intent to injure or defraud, the presiding judge excluded evidence offered by the defendant consisting of excerpts from a book entitled "Forgeries and False Entries" written by one who had testified for the Commonwealth as an expert in handwriting. It did not appear for what purpose the evidence was offered and there was nothing to show that the excerpts had any tendency to contradict or control the testimony of the government witness. *Held*, that the exclusion was right, the opinions expressed in the book being on the same footing as opinions expressed in medical books.

At the trial of an indictment under R. L. c. 209, § 1, for forging a public record with intent to injure or defraud by making alterations in the valuation lists of the assessors of a town, where it appears that the defendant was a member and the chairman of the board of assessors, evidence is competent and material which shows that the defendant made the alterations with an intent to cheat and defraud and not for the purpose of correcting errors, and evidence also is competent, as tending to show a motive to commit the crime, that intimate relations of friendship existed between the defendant and certain persons whose property had been assessed and that the alterations had been made to enable those persons to escape the payment of taxes that had been assessed to them lawfully.

At the trial of an indictment under R. L. c. 209, § 1, for forging a public record, where it is material to show that alterations made in the valuation lists of the assessors of a town were in the handwriting of the defendant, it is proper for the presiding judge to admit in evidence as a standard of comparison a deed, to which the defendant was not a party, which is shown to have been written by him.

An exception in a criminal case to a refusal of the presiding judge to instruct the jury that "upon all the evidence in the case the verdict must be not guilty" cannot be sustained if all the evidence is not reported or described and the bill of exceptions shows no error of law.

In a criminal case, as in a civil one, exceptions to the admission or exclusion of evidence cannot be sustained, where all the evidence material to the exceptions is not reported or described and it does not appear how the evidence in question applied to the case as it stood when such evidence was presented.

CROSBY, J. The indictment against the defendant was in fifteen counts and charged him with forgery.

At the close of the evidence the district attorney, with the consent of the defendant, *not proessed* ten of the counts, and the jury returned a verdict of guilty on each of the other five counts, which charged the defendant under R. L. c. 209, § 1, with forging "a certain public record, to wit, a valuation list of the town of Revere in said county."

The government offered evidence to prove that certain fictitious entries and charges had been made by the defendant in the valuation lists for the years 1911 and 1912 of the town, prepared by the board of assessors, of which board the defendant was the chairman. The government, for the purpose of proving such false entries and alterations, offered in evidence the valuation books for the years 1911 and 1912, which contained the valuations for those years. This evidence was admitted subject to the defendant's exception, it being his contention that such books were not "public records" within the meaning of R. L. c. 209, § 1, under which the counts in the indictment were drawn.

R. L. c. 35, § 5, provides that "In construing the provisions of this chapter and other statutes, the words 'public records' shall, unless a contrary intention clearly appears, mean any written or printed book or paper, any map or plan of the Commonwealth or of any county, city or town which is the property thereof and in or on which any entry has been made or is required to be made by law."

The law requires assessors of cities and towns to make upon books furnished for that purpose valuations and assessments. St. 1909, c. 490, Part I, §§ 55-64. It is plain that as the entries in such books are "required to be made by law," the books and their contents are public records within the meaning of R. L. c. 35, § 5. The valuation lists having been delivered to the tax collector without being accompanied by a warrant for the collection of taxes therein assessed, did not render the offense less complete if such lists had been altered by the defendant with intent to defraud.

It follows that the defendant's requests numbered 5, 6, 7, 8, 9 and 10 * could not have been given.

* The rulings thus requested were as follows:

"5. The valuation lists referred to in various counts contained in the indictment not having been accompanied by a warrant to the tax collector at the time of their delivery to him are not, or were not, at the time of the alleged forgery such instruments as would be the subject of forgery by changes and alterations therein.

"6. A valuation list is not a public record within the meaning of R. L. c. 209, § 1.

"7. A valuation list until completed is not a public record within the meaning of R. L. c. 209, § 1.

The exception to the admission of the valuation books on the ground that certified copies of such books were the best or the only evidence, cannot be sustained. While the R. L. c. 175, § 74, provides that copies of books, papers, documents and records duly authenticated by the officer who has charge of the same, shall be competent evidence in all cases equally with the originals, yet the originals are not thereby rendered incompetent as evidence. *Fitch v. Randall*, 163 Mass. 381. *Day v. Moore*, 13 Gray, 522.

The offense of forgery may consist in the alteration in a material part of a valid document by which another may be defrauded. It is not necessary to the offense that the whole instrument should be fictitious. *Commonwealth v. Boutwell*, 129 Mass. 124.

The Commonwealth, in order to convict, is not required to prove that there was an intent to defraud a particular person, but it is sufficient to prove a general intent to defraud some one. The defendant's request numbered 15 * must therefore be over-

"8. A valuation list is not completed until the warrant to the tax collector has been issued for the collection of the taxes based upon the valuation set forth in said list so that said list can be forged by changing or altering the contents thereof.

"9. Upon all the evidence in the case the jury would be justified in finding that the valuation lists mentioned in various counts of the indictment had not been completed at the time of the alleged changes and alterations therein.

"10. The valuation lists mentioned in the indictment were not efficient instruments at the time of the alleged changes and alterations, that is, instruments capable of being forged."

* The ruling thus requested and those referred to on page 505 were as follows:

"13. Upon all the evidence in the case the jury would not be justified in finding that the town of Revere, the public, the taxpayers of Revere, or any individual has been defrauded by the alleged alterations and changes in any of the instruments described in said indictment.

"14. If the jury should find that any of the alterations and changes alleged to have been made were in fact made and no fraud or injury could result from said changes and alterations, unless some future act, or acts, on the part of the defendant, or some third person, or some official board were necessary in order to bring about and effectuate said fraud or injury, and that said other act had not taken place or been enacted, then the verdict must be not guilty.

"15. The burden is upon the government to prove beyond a reasonable doubt that any changes, or alterations, made in any of the instruments described in the indictment were made with intent to injure or defraud some

ruled. *Commonwealth v. Brown*, 147 Mass. 585. *Commonwealth v. Henry*, 118 Mass. 460. It is not necessary for the government to prove that any person actually was defrauded. The false making or alteration with intent to defraud is the gist of the offense. Accordingly the defendant's requests numbered 13 and 14 * could not have been given. *Commonwealth v. Ladd*, 15 Mass. 526. *Commonwealth v. Bond*, 188 Mass. 91.

The defendant offered in evidence certain excerpts from a book written by one Hingston, a witness who had been called by the Commonwealth as an expert in handwriting. The title of the book was "Forgeries and False Entries." This evidence was excluded rightly; it does not appear for what purpose it was offered; there is nothing in the record to show that the excerpts offered would have had any tendency to contradict or control the testimony of the witness, nor was such evidence competent to prove the truth of the statements therein contained. Such evidence stands upon the same footing as medical books. It is well settled in this Commonwealth that medical books are incompetent as evidence; nor are the opinions of medical experts admissible unless testified to by themselves as witnesses. *Allen v. Boston Elevated Railway*, 212 Mass. 191.

Where, as in this case, intent was a material issue, evidence having a bearing upon the intent of the defendant in making erasures, additions or alterations in the valuation lists was clearly admissible. The defendant, as a member and chairman of the board of assessors, was charged with the duty of preparing full and accurate lists, and, if such lists as originally made up contained errors or omissions, it was entirely proper for the defendant to correct such errors. If the evidence showed that alterations had been made in the lists by the defendant, it was competent and material for the government to show that the defendant made such alterations with intent to cheat and defraud and not for an honest and legitimate purpose. *Commonwealth v. Bradford*, 126 Mass. 42.

So also evidence was competent to show that the defendant particular person or persons. It is not enough that the ultimate result of said changes or alterations coupled with other wrongful acts may in the future result in a general injury to taxpayers in the town of Revere."

* See footnote on page 504.

had a motive in committing the offense charged; and for this reason evidence of the intimate relations of friendship between the defendant and those persons in whose names property had been assessed, and that the alterations had been made in the valuation lists to enable them to escape from the payment of taxes that had been assessed legally, was admissible.

The government contended that the defendant was either the real owner of the parcels of real estate benefited by such alterations in the assessment, or stood in such intimate relations of friendship with the persons in whose names such estates were assessed that he had a motive in making the alterations.

Such evidence was competent to prove that the defendant had a motive peculiar to himself to commit the crime charged. *Commonwealth v. Webster*, 5 Cush. 295. *Commonwealth v. Hudson*, 97 Mass. 565. *Commonwealth v. Howard*, 205 Mass. 128.

It was a material issue in the case whether the alterations in the valuation lists were in the handwriting of the defendant; accordingly the deed from McLeod to Cazale, written by him, was properly admitted as a standard of comparison to show that the alterations in the valuation lists were made by him. The defendant's ninth exception must be overruled. *Commonwealth v. Tucker*, 189 Mass. 457.

As all the evidence is not reported we cannot determine that the jury should have been instructed to return a verdict of not guilty. The defendant's first request * could not have been given. The exceptions taken to the conduct of the presiding judge† show no reversible error.

The case seems to have been tried fairly, without any substantial prejudice to the defendant's rights. What has been said disposes of many of the exceptions saved during the course of the trial. We have carefully examined all the exceptions, including those relating to the admission and exclusion of evidence, and, without referring to all of them in detail, we cannot discover any error in the rulings made by the trial judge.

As the evidence is not reported in full, we are unable to deter-

* The ruling thus requested was as follows: 1. Upon all the evidence in the case the verdict must be not guilty.

† *Brown, J.* The exceptions referred to related to certain remarks made by the judge.

mine in certain instances whether evidence was rightly or wrongly admitted or excluded, because it does not appear how such evidence applied to the case as it stood when the evidence was presented, and therefore the bill of exceptions fails to show that the rulings made were erroneous. Accordingly such exceptions to the admission or exclusion of evidence must be overruled.

No question is raised as to the charge, and it is not contended that full and accurate instructions were not given to the jury. *Commonwealth v. Collins*, 16 Gray, 29. *Commonwealth v. Sturtivant*, 117 Mass. 122, 139. *Commonwealth v. Salmon*, 136 Mass. 431.

Exceptions overruled.

The case was submitted on briefs.

E. P. Barry, J. R. McHugh & T. E. Flanagan, for the defendant.

T. D. Lavelle, Assistant District Attorney, for the Commonwealth.



COMMONWEALTH vs. GLEN F. FARMER & others.

Suffolk. June 20, 1914. — September 10, 1914.

Present: RUGG, C. J., HAMMOND, BRALEY, DE COURCY, & CROSBY, JJ.

Constitutional Law, Right to clear statement of charge in indictment, Right not to testify. *Larceny. Pleading, Criminal*, Indictment. *Evidence*, Of intent, Presumptions and burden of proof, Circumstantial. *Practice, Criminal*, Conduct of trial. *Words*, "Steal."

The word "steal" as used in an indictment for larceny under the short form set forth in R. L. c. 218, has become a term of art and includes the criminal taking of personal property either by larceny, embezzlement or false pretenses.

Article 12 of the Declaration of Rights requires in an indictment for larceny only such particularity of allegation as may be of service to the defendant in enabling him to understand the charge and prepare for his defense, and, where the statutory form of indictment is used, this right is sufficiently protected by R. L. c. 218, § 39, providing for a bill of particulars in case the defendant desires more specific information as to the crime which he is alleged to have committed.

There is nothing in the provisions of R. L. c. 218 in regard to the form of an indictment for larceny by false pretenses that violates any right secured by the Fourteenth Amendment or any other provision of the Constitution of the United States.

On an indictment for larceny from a certain woman, it appeared that the defendant induced the woman to give him large sums of money amounting to more than \$80,000 for certain sets of books, of which the total value was less than \$5,000,

by means of representations, including a statement that he could sell one of the sets of books for \$75,000, and a later statement that he had sold the set of books for that amount to a Chicago man whose name he said he could not disclose. It further appeared that the defendant and his associate gave false names and addresses, so that no trace might be found of them, and that the defendant made a statement to an officer of a bank on whom the woman gave him a check or draft as to the proposed application of the money which was wholly inconsistent with his representations to the woman herself. It appeared that the woman was utterly ignorant of the subject matter and acted without the slightest advice from any one except the defendant and his associate. The presiding judge ruled that representations of the defendant as to the future and those as to the value of the sets of books did not constitute false pretenses, but left the case to the jury, instructing them in substance that the defendant might be found guilty of making fraudulent representations as to existing facts. After a verdict of guilty, the defendant, upon the argument of his exceptions, contended that there was no evidence that the representations as to a purchaser and his agreement to buy the set of books were false to the knowledge of the defendant or that they were made with intent to defraud. *Held*, that upon the circumstances shown, including those stated above, the jury were warranted in finding that there was no such customer and no such agreement and that the representations of the defendant were fraudulently false.

At the trial of an indictment for larceny by false pretenses whereby a certain woman was induced to pay large sums of money for sets of books of little value by representations of the defendant that he could sell one of the sets for a large sum of money named and that a certain man had agreed to pay that sum, it is proper to admit evidence tending to show that, about two years before the beginning of the defendant's transactions with the woman alleged to have been defrauded, he had made to two other persons false representations of a kindred nature in regard to the sale of extremely valuable publications to persons of great wealth, the testimony being limited strictly by proper instructions of the presiding judge to the issue of the defendant's intent in his representations made to the woman alleged to have been defrauded.

On an indictment for larceny by obtaining money from a certain person by false and fraudulent representations, it is not necessary to show, in order to convict the defendant, that the fraudulent representations made by him were the only influence operating upon the mind of the person in question to induce him to give up the money. It is enough to show that the fraudulent representations made by the defendant were a decisive influence to that end.

At the trial of an indictment for larceny by false pretenses, the district attorney during his closing argument said, "Now, because the defendants do not take the stand no presumption, the law says, is to be taken against them. . . . I will say again, the law places a cloak over these defendants and does not oblige them to take the stand." The presiding judge instructed the jury accurately and fully as to the right of the defendants not to testify and told them that no adverse inferences could be drawn from the defendants' failure to become witnesses, and also instructed them correctly as to the proper scope of the arguments of counsel and the significance to be attached to such arguments. *Held*, that, although the argument of the district attorney seemed to have gone rather far, it was within the discretionary power of the judge in the conduct of the trial not to interrupt the argument, and that the rights of the defendants were protected fully by the instructions of the judge.

At the trial of an indictment for larceny by false pretenses, the presiding judge instructed the jury, that, in deciding whether or not they were satisfied beyond a reasonable doubt that the pretenses were false, they might draw, without direct evidence to that effect, such inferences as they thought ought to be drawn and as they were "satisfied beyond a reasonable doubt should be drawn," and further instructed them that they might draw such inferences as they felt "compelled to draw as reasonable men." *Held*, that these instructions, when taken in connection with the charge as a whole, were not too broad and were accurate as applied to the evidence and the issues.

RUGG, C. J. These are indictments against the several defendants for larceny and conspiracy to commit larceny. The defendants Powers and Rosenfield were found guilty upon one count charging larceny of \$3,000 from Mary L. Rogers. The same defendants were found guilty on an indictment charging a conspiracy to commit larceny from Mrs. Rogers. The defendants Farmer and Rosenfield were found guilty upon one count charging larceny of \$19,000 from Mrs. Rogers. The defendant Rosenfield was found guilty upon six other counts charging larceny of large sums of money from Mrs. Rogers.

1. The defendants seasonably filed motions to quash on the ground that the form of the indictments in each count violated their rights under the Constitution of the Commonwealth and that of the United States. The indictments in all the counts followed the short forms set forth in the criminal pleading act. R. L. c. 218. The constitutionality of the statute in this respect has been sustained in several decisions. It now is unnecessary to do more than summarize the conclusions reached. The word "steal" used in the indictment for larceny has become a term of art and includes the criminal taking of personal property either by larceny, embezzlement or false pretenses. The Constitution of Massachusetts, article 12 of the Declaration of Rights, requires only such particularity of allegation as may be of service to a person charged with crime in enabling him to understand the charge and prepare his defense. The provisions of R. L. c. 218, § 39, require a bill of particulars setting out adequate details where the indictment alone does not sufficiently inform the defendants, and this as matter of right. The motion to quash was overruled rightly. *Commonwealth v. Kelley*, 184 Mass. 320. *Commonwealth v. Sinclair*, 195 Mass. 100. *Commonwealth v. Bailey*, 199 Mass. 583. *Commonwealth v. King*, 202 Mass. 379.

2. The defendants have not pointed out the provision of the Federal Constitution under which they contend that their rights have been infringed. It has been decided repeatedly that articles 5 and 6 of the amendments do not apply to powers exercised by the States. *Edwards v. Elliott*, 21 Wall. 532. *The Justices v. Murray*, 9 Wall. 274. It seems too plain for argument that this statute violates no rights secured by the Fourteenth Amendment or any other provision of the Constitution of the United States.

3. The material representations relied upon by the Commonwealth as having been made by one or more of the defendants and as having induced Mrs. Rogers to give to the defendants or some of them very large sums of money aggregating more than \$80,000, related to the character of certain sets of the works of Shakespeare and of other authors and to the price which customers therefore already had agreed to pay for them. There was evidence tending to show that the defendant Powers, giving the false name of Clark, called upon Mrs. Rogers and referred to a set of Shakespeare, which afterwards he brought to her, saying that "it was a very rare set and if she would take them and keep them during the summer he would sell them for her in October. . . . I can get \$75,000 for that set of Shakespeare . . . he said there were ten or twelve sets of Shakespeare that went together; that there was one set that they were unable to get; and that if they could get the whole sets he could sell them for \$75,000." Later the defendant Rosenfield called at Mrs. Rogers' house saying, "I come from Mr. Clark [the name falsely given by Powers] in regard to the Shakespeare set. He said, there was one series missing and I have succeeded in finding it, but I found it in manuscript form, in loose sheets, and Mr. Powers [Mr. Clark] says that you will pay for the binding of it and that it would go right in with your set." He said further that there were ten sets of these Shakespeare and that he "could sell the whole set for \$75,000. I have a customer who will pay it. I am collecting a set for a millionaire in Chicago who is building a handsome house and wants a handsome library, and he has commissioned me to get it for him. . . . I can put those books right into that library and you can get \$75,000 for them." Still later when he came to get more money Rosenfield said "he had sold the books to the Chicago man; that she asked him the name of the Chicago man, and he said he

could n't tell his name as he was doing business through the man's agent, by the name of Gilman, but he said that he had sold all the books to that man for \$250,000." Other representations of the same general nature were made. The judge * ruled that representations relating to the future and those as to value of the sets of books did not constitute false pretenses. But he left the cases to the jury with instructions in substance that the defendants might be found guilty of making fraudulent representations as to existing facts.

The defendants contend that there is no evidence that the representations as to a purchaser and his agreement to buy the books were false to the knowledge of the defendants and made by them with intent to defraud, and hence that no crime was proved. There was evidence that the total value of the books sold to Mrs. Rogers was less than \$5,000. No question can be raised that these representations were not material or were not calculated to deceive, or that they did not induce Mrs. Rogers to part with her money. There was no explicit testimony to the direct effect that there was no such customer and that no such agreement was made. In the nature of things it would be difficult to prove the negative of such representations by positive evidence. These representations showed on their face inherent indications of improbability. When brought to the test of common sense they appear fantastical and visionary. They challenge the credulity of ordinary people and hardly could impose upon persons of experience and poise. All the circumstances point to the perpetration of a gross fraud in securing such extraordinary sums of money by entire strangers from a woman who was utterly ignorant of the subject matter and who acted without the slightest advice from any one aside from the defendants.

There were other incidents which indicated a scheme of impostors. The defendants gave false names and false addresses, so that no trace might be found of them. Rosenfield made a statement to an officer of the bank on which Mrs. Rogers gave him a check or draft as to the proposed application of the money wholly inconsistent with the representations made to Mrs. Rogers. These circumstances should be considered together and not

* Chase, J.

separately in order to determine the falsity of the representations. Treating them collectively there was enough to warrant the jury as rational men in concluding that these representations were fraudulently false and that there was no such customer and no such agreement. *Commonwealth v. Howe*, 132 Mass. 250. *Jules v. State*, 85 Md. 305. While some representations were promissory only, others were positive statements of existing facts of a nature calculated to influence the conduct of such a person as Mrs. Rogers. There was no error in submitting this matter to the jury.

4. Evidence was admitted against the exception of the defendant Farmer tending to show that within about two years before the beginning of his relations with Mrs. Rogers, Farmer had made to two other persons false representations of a kindred nature touching the sale of extremely valuable publications to persons of great wealth. This testimony was limited strictly to the issue of Farmer's intent in his personal transactions with Mrs. Rogers. The principle of law governing the introduction of evidence of this kind has been discussed with fullness and accuracy in *Commonwealth v. Jeffries*, 7 Allen, 548, and in *Commonwealth v. Jackson*, 132 Mass. 16. Summarily stated it is that it is not competent to show one crime committed by a defendant for the purpose of proving that he committed another distinct crime. Guilty conduct in one instance does not follow from like conduct on another occasion. Moreover, it is not fair that a defendant should be called upon in the course of a trial to exonerate himself from offenses not charged against him in the indictment. But commonly it is necessary to prove a particular intent as an essential ingredient of the crime alleged. The thought of the human mind is not capable of direct observation. It can be determined only from external signs and from the knowledge the person is proved to possess. Some offenses are not so plain and distinct and so connected with visible facts that the accompanying intent can be inferred without further aid. Obtaining money or property by fraudulent pretenses under some conditions belongs to this class. Conduct of one on another occasion reasonably near in time under similar circumstances if appearing to be parts of a comprehensive scheme by which different persons are to be defrauded, may have an important bearing upon his purpose in

doing a particular act. *Commonwealth v. Stuart*, 207 Mass. 563, 568, *Commonwealth v. Dow*, 217 Mass. 473, and cases cited in each opinion. *King v. Boyle*, [1914] 3 K. B. 339, 347. *Makin v. Attorney General*, [1894] A. C. 57, 65. This principle was not narrowed by the decision nor by anything said in *Noyes v. Boston and Maine Railroad*, 213 Mass. 9. Although the facts bring the present case close to the line, no reversible error is shown in admitting the evidence. It had some tendency to show a fraudulent intent on the part of Farmer.

5. The request of the defendant Powers that if the jury were satisfied that the representations made by him to Mrs. Rogers, to the effect that there was one missing set of Shakespeare, would not have induced her to part with her money if it had not been combined with the representation as to the value of \$75,000 for the sets together, was refused rightly. It is enough to constitute the crime of obtaining money by false pretenses and thus of larceny under the statute if the fraudulent representation was a decisive although not the sole influence operating upon the mind of the person to induce the giving up of money. Other statements or considerations not amounting to false pretenses may co-operate to that result without impairing the force of the criminal act. *Commonwealth v. Drew*, 19 Pick. 179, 183. The false statement of fact embodied in the request was not the only one for which the defendant Powers might have been found to have been responsible. Mrs. Rogers may have been induced also by the representation of Rosenfield that he had a customer for the complete set at \$75,000. If the jury found that Powers and Rosenfield were acting with a common design to defraud, Powers would have been bound by that statement made by Rosenfield. The jury were told plainly that Powers was not to be convicted unless Mrs. Rogers parted with her money by reason of false representations fraudulently made by the defendants and the distinction between statements of past or present facts and of opinions, promises and prophecies was explained with accuracy.

6. The district attorney during his closing argument said: "Now, because the defendants do not take the stand no presumption, the law says, is to be taken against them. . . . I will say again, the law places a cloak over these defendants and does not oblige them to take the stand." Seasonable objection was made

to this statement. The judge instructed the jury accurately and fully as to the rights of the defendants not to testify and that no adverse inferences could be drawn from their failure to become witnesses, and as to the proper scope of the arguments of counsel and the significance to be attached to such arguments. There was no error in this respect. The principle of the common law secured by the Constitution that one charged with crime cannot be compelled to testify in any prosecution against himself, and that his failure to avail himself of the statutory privilege of becoming a witness cannot be permitted to create any inference against his innocence, is guarded sedulously. The argument of the district attorney seems to have gone rather far. But something must be left to the discretion of the judge in the conduct of the trial. A mere reference in argument by the district attorney to this principle of law when correctly stated and without prejudicial color or setting is not error if accurate instructions are given fully to protect the rights of the defendant. But the trial judge must be jealous to see to it that any such reference is made fairly and in such way that in fact no prejudice shall come to the defendant. The subject was considered at length in *Commonwealth v. Richmond*, 207 Mass. 240, 247-250, where many of the authorities now relied on by the defendant as well as our own decisions were reviewed. The law of this Commonwealth as there restated shows that the charge protected the rights of these defendants.*

* The charge upon this point was as follows: "I have already told you, I am sure, that defendants in prosecutions for crime have the privilege of taking the stand in case they desire to. That is a privilege that is given; it is not an obligation which is imposed upon them. They can or they need not take the stand. It matters not in case they decide not to take the stand what motives prompt them to come to that decision. You should not speculate in your minds as to the reason why they did it. If that is the situation, if the testimony closes without the defendants having taken the stand, you are to consider that they are disqualified from taking the stand, from some reason or other. The situation, so far as your duty is concerned, is exactly as if they could not get from the place where they sit at the bar to this stand, and as if there was some reason which prevented them from getting up here. You have got to take this case and decide it entirely aside from that fact. Of course, they did not take the stand. That, of course, is apparent before your eyes. But I say that is a right which the law gives them. They may decline to take the stand and no inference whatever is to be drawn against

7. The instructions that the jury, in deciding whether or not they were satisfied beyond a reasonable doubt that the pretenses were false, might without direct evidence to that effect draw such inferences from what was in evidence as they thought ought to be drawn and as they were "satisfied beyond a reasonable doubt should be drawn," and further that they might draw such inferences as they felt "compelled to draw as reasonable men," were not too broad when taken in connection with the charge as a whole, and were accurate as applied to the evidence and the issues.

Other exceptions appear not to be argued and may be treated as waived. But a careful examination of the record fails to disclose any reversible error.

Exceptions overruled.

The case was submitted on briefs.

L. Marks, C. S. Hill & B. C. Bachrach, for the defendants Farmer and Rosenfield.

R. H. Sherman, for the defendant Powers.

D. V. McIsaac, Assistant District Attorney, for the Commonwealth.

ISABELLA F. O'DAY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

THOMAS F. O'DAY *vs.* SAME.

Middlesex. March 5, 1914. — September 11, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Negligence, Elevated railway, Violation of rule, Unnecessary violence. *Carrier*, Of passengers.

In an action by a woman against a corporation operating an elevated railway for personal injuries sustained by the plaintiff by being pushed from the platform of a car on a train of the defendant, if it can be found that the plaintiff was carried off her feet because of the conflict between incoming and outgoing passengers at a crowded elevated station of the defendant, that the defendant had a rule to the effect that passengers should be induced to leave such cars by the

them by reason of the fact. A reason which is sufficient, so far as the law goes conclusive, and which you have no right to speculate upon or inquire into, has prompted them to rest upon other evidence in the case."

side doors and enter by the end doors and that passengers wishing to leave a train should be permitted to do so before others were permitted to board it, and that the defendant's servants made no attempt to enforce this rule, and if the defendant's superintendent testifies that he did not undertake to comply with the rule, there is evidence for the jury of the defendant's negligence.

If a woman passenger on a train of an elevated railway is pushed from the platform of a car at a station and falls so that one of her legs is wedged between the step of the car and the station platform, and if the servants of the corporation operating the railway, after finding that the woman cannot be extricated from her plight by the use of reasonable force, drag her out by the use of unreasonable force so that her leg is injured greatly, although there were tools at hand which might have been used to release her leg by cutting away a part of the platform, this gives the injured passenger a right of action against the corporation, irrespective of the cause of her fall from the car.

In an action against a corporation operating an elevated railway for personal injuries sustained by the plaintiff by being pushed from the platform of a car on a train of the defendant at a crowded elevated station, the plaintiff, for the purpose of showing that the defendant had reason to anticipate trouble from the crowded condition of the platform, should be allowed to show what had occurred on previous occasions under the same conditions that obtained at the time the accident happened, although it did not occur at the same hour of the day.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries sustained on February 23, 1909, in the manner described in the opinion, and the second by her husband for consequential damages. Writs dated April 15, 1909.

In the Superior Court the cases were tried together before *Dana, J.*, who at the close of the plaintiffs' evidence, which is described in the opinion, ruled that the plaintiffs were not entitled to recover and ordered verdicts for the defendant. The plaintiffs alleged exceptions.

James J. McCarthy, (T. F. Waldron with him,) for the plaintiffs.

H. D. McLellan, for the defendant.

LORING, J. The jury were authorized in finding that the plaintiff in the first case, when a passenger on a car in an elevated train of the defendant, was carried off her feet by a rush of passengers attempting to alight from the car; that she fell between the step of the car and the platform; that one of her legs went down under her whole weight between the step and the platform and she was thereby pinned in; and that at the time she was carried off her feet she was standing up, holding on to a grab iron near the rear door of the car, not intending to alight at the station in question.

It appeared that at the time of the accident the following rule of the defendant company was in force: "Passengers should be induced to leave cars by the side doors and enter by the end doors, provided doors and gates stop abreast of a safe place on the station platform. Passengers wishing to leave train must be allowed to do so before others are permitted to board." The car in which the plaintiff was travelling had a door at each end and one door in the middle. The jury were warranted in finding that, though there was a guard between the car on which the plaintiff was and the car next to it, he made no effort to comply with this rule, but that on the contrary the end doors of the car were opened immediately on the arrival of the car at the station in question and were not kept shut until passengers intending to alight had left or had begun to leave by the middle door. More than that, the superintendent, on being asked why this rule was not complied with, testified in effect that he did not undertake to comply with the rule "because it would be shutting doors in people's faces." Further the jury could have found that the plaintiff was carried off her feet because of the conflict between the incoming and outgoing passengers. Under these circumstances the plaintiff had a right to go to the jury under the doctrine of *Stevens v. Boston Elevated Railway*, 184 Mass. 476.

There was also evidence that after the plaintiff had fallen between the step and the platform the defendant's servants, after two ineffectual efforts to help her get up, dragged her out by main force. It was in evidence that there were tools at hand which might have been used to cut away the platform and thus release her from the painful position in which she had been placed after the two ineffectual efforts had shown that she could not get up or be pulled out by the use of reasonable force. There was evidence that in consequence of the manner in which she had been dragged out her leg "was deeply bruised, later there was tremendous discoloration, black and blue places all the way down her leg," and that the plaintiff "at the time of the trial was unfit to come into court to testify or to be in court during the trial because of her mental condition" caused by the treatment which she had received from the defendant. When the plaintiff was pinned in between the platform and the step of the car she became an obstacle to the further operation of the railway, and the jury were

warranted in finding that the defendant's servants in removing her used unnecessary force. The plaintiff was entitled to go to the jury on this ground as a second ground of liability.

The questions as to the admission of evidence which have been argued in this case are not likely to occur in the same form at the new trial, and therefore we do not examine them with particularity. But it is proper to point out that the presiding judge confined the plaintiff within too narrow bounds when he limited her in putting in evidence as to what had occurred at other times to occurrences at or about the same hour at which this accident occurred. The plaintiff should have been allowed to put in evidence of what had occurred on previous occasions under the same conditions that obtained at the time at which this accident occurred, though it did not occur at the same hour.

The entry must be

Exceptions sustained.

JULIUS ROSENBERG & another vs. NATIONAL DOCK AND STORAGE
WAREHOUSE COMPANY.

MAX RUBIN & another vs. JULIUS ROSENBERG & another.

Suffolk. March 9, 10, 1914. — September 11, 1914.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & CROSBY, JJ.

Warehouse Receipts Act. Warehouseman. Conversion.

The provision of the warehouse receipts act, St. 1907, c. 582, § 21, that "a warehouseman shall be liable to the holder of a receipt for damages caused by the non-existence of the goods," does not undertake to define the holder of a receipt, and does not change the rule established in this Commonwealth by *Sears v. Wingate*, 3 Allen, 103, that a principal, whose agent has authority to issue receipts on the delivery of goods to the principal, is not bound by a receipt issued by such agent for goods which have not been delivered to the principal.

Whether a warehouseman, whose agent has authority to issue receipts on the delivery of goods to the warehouseman and who issues a receipt for goods which the warehouseman never received, may be made liable upon such instrument if the warehouseman was negligent in the way in which he allowed such agent to conduct his business in regard to the issuing of receipts, here was mentioned as a question not passed upon in this case, where it was found by the trial judge on evidence not reported that there was no negligence on the

part of the warehouseman and where upon the facts stated in the report of the judge his finding was not wrong as matter of law.

In an action for the conversion of fifty bales of rags, it appeared that the manager of a warehouse corporation undertook to sell personally fifty bales of rags to the defendant and gave him what purported to be a receipt of the warehouse corporation for the rags, which was void against that corporation because it represented no rags delivered to the corporation, that the manager then changed the marks on fifty bales of rags in the warehouse belonging to the plaintiff and delivered those bales to the defendant in exchange for the supposed warehouse receipt, that afterwards the warehouse corporation lent to the plaintiff without interest an amount of money equal to the value of the rags with an agreement that, if the plaintiff should recover damages from the defendant, the loan should be repaid at the time and in the proportion that such recovery should be had, and that at the same time the plaintiff undertook to assign all his claims against the defendant to the warehouse corporation and appointed that corporation his attorney to sue the defendant in the plaintiff's name or otherwise for the conversion of the fifty bales of rags. The defendant contended that the money paid to the plaintiff by the warehouse corporation, which purported to be a loan, was paid by the corporation in satisfaction of the plaintiff's claim against the corporation for the conversion of the rags, that thereby the title to the rags was vested in the warehouse corporation, and that therefore the plaintiff had no title at the date of the writ to maintain an action for the conversion. *Held*, that the arrangement between the warehouse corporation and the plaintiff was as matter of law a loan, as it purported to be, and afforded no defense to the plaintiff's action against the defendant for the conversion of the rags.

LORING, J. These two actions grow out of a purchase of rags made by Rosenberg Brothers (the plaintiffs in the first action) from one Ripley, who was the manager of the warehouse of the defendant warehouse company. At the date of the sale in question Ripley had no rags in the warehouse. In spite of that he made out and delivered to Rosenberg Brothers what purported to be a non-negotiable warehouse receipt of the defendant warehouse company for seventy bales. This receipt was in the usual form, signed by him as general manager, but no marks were given on it for the bales. This was on January 28, 1913. On the first of the following March Ripley caused the marks on seventy bales belonging to M. Rubin and Company (the plaintiffs in the second action), then in store in the defendant's warehouse, to be changed from (D) to (R), and delivered these rags to Rosenberg Brothers. Just before March 1 Ripley had bought of Rubin and Company seventy bales of rags. But by the terms of this purchase the rags were to be retained by Rubin and Company

until paid for by Ripley, and no payment under that contract of purchase had been made by Ripley on March first, when he delivered the seventy bales to Rosenberg Brothers. Later he paid Rubin and Company for twenty of these seventy bales and got a delivery order for them from Rubin and Company.

The first action is brought by Rosenberg Brothers to recover from the warehouse company for the fifty bales for which Ripley did not get a delivery order from Rubin and Company.

There was another somewhat similar transaction which was covered by the action brought by Rosenberg Brothers against the warehouse company. But the second cause of action confessedly fails if the first fails, and it is not necessary to state it. The declaration contained eight counts. The first four related to the transaction which we have stated, and the second four related to the second cause of action which it is unnecessary to state.

In the first three the plaintiffs counted upon the fact that the warehouse receipt for the seventy bales, received by Rosenberg Brothers on January 28, was delivered to it by the defendant warehouse company, and upon § 21 of the warehouse receipts act, which provides that "a warehouseman shall be liable to the holder of a receipt for damages caused by the non-existence of the goods." In the fourth the plaintiffs counted upon the negligence of the warehouse company in the way it allowed Ripley, its manager, to carry on its business.

Before the warehouse receipts act (St. 1907, c. 582), it was the settled law of this Commonwealth that a principal is not liable where his agent (with authority to issue receipts on the delivery of goods) issues a receipt for goods which had not been delivered. *Sears v. Wingate*, 3 Allen, 103. But on this point there is a great conflict between the States. The decisions are collected in Wiliston on Sales, § 419. The ground on which the plaintiffs in the first action contend that they are entitled to recover is that the rule of *Sears v. Wingate* was changed by § 21 of the warehouse receipts act.* But no change in the rule of *Sears v. Wingate* was made by that section. If this conflict in the authorities had

* St. 1907, c. 582, § 21, so far as material is in these terms:

"A warehouseman shall be liable to the holder of a receipt for damages caused by the non-existence of the goods, or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue."

been the result of a difference upon a question of the law of warehouse receipts it could and doubtless would have been ended by this uniform warehouse receipts act enacted in this Commonwealth in St. 1907, c. 582. But the conflict in place of being a difference of opinion as to the law of warehouse receipts was a difference of opinion upon one of the general principles of the law of agency. The general principles of the law of agency could not with propriety be dealt with and made uniform in a warehouse receipts act. Nor could an exception to the general law of agency be made, so far as warehouse receipts are concerned, where the former law of agency was kept unchanged in case of receipts issued by other agents under what from a legal point of view were the same conditions. It was therefore inevitable that this conflict which existed at common law should continue under the uniform warehouse receipts act.

Manifestly it was for these reasons that § 21 of the warehouse receipts act was limited to providing that a warehouseman should be liable for the non-existence of the goods, and did not undertake to state the facts which did or did not make one a holder of a receipt. *Sears v. Wingate*, *ubi supra*, is still law in this Commonwealth and is decisive against the plaintiffs' allegation in each of the first three counts that they are the holders or the "bearer" of a warehouse receipt issued to them by the defendant warehouse company. For this reason they have failed to make out the case stated in the first three counts of the first action.

It is enough to say of the fourth count that the judge * found as a fact that "The warehouse [company] was not negligent in failing to watch Ripley more sharply or to catch him more quickly." That is to say, the judge found that there was no negligence on the part of the warehouse company. The evidence before the judge is not before us. On the facts stated in his report the finding was not wrong as matter of law. We say that the finding was not wrong as matter of law because that is the question we have to consider. In stating the point in that way we do not mean to intimate that the finding would have been the other way

* *Foz, J.*, before whom the cases were tried without a jury. He found for the defendant in the first case and in the second case found for the plaintiff in the sum of \$1,696.27, and reported the cases for determination by this court.

had the question of fact been before us. Under these circumstances it is not necessary to consider the questions which would have arisen had the judge found as a matter of fact that the warehouse company was negligent in the way in which it allowed Ripley to conduct its business.

The only defense which is made to the second action is one arising out of a subsequent transaction between the plaintiffs in that action and the warehouse company. The defendants in the second action now admit that but for that subsequent transaction Rubin and Company would have had a right to recover from Rosenberg Brothers for the conversion of fifty bales of rags belonging to Rubin and Company and delivered by Ripley to Rosenberg Brothers. The subsequent transaction was as follows: On March 27, 1913, the warehouse company handed to Rubin and Company \$1,874.84, under an arrangement which is set forth in Exhibit X, a copy of which is printed below.* At the same time Rubin and Company undertook to assign to the warehouse company all their claims against Rosenberg Brothers, and appointed the warehouse company their attorney to enforce in their name or otherwise, their right to recover from Rosenberg Brothers for the conversion of the fifty bales of rags. The contention of the defendants in the second action is that this was a payment by the warehouse company to Rubin and Company of Rubin's claim against

* "Exhibit X.

"Boston, March 27, 1913.

"Borrowed and received from the National Dock & Storage Warehouse Company the sum of \$1,874.84, being a loan without interest pending the ascertainment of whether Rosenberg Bros. of Chelsea or any other person, are or is liable to M. Rubin & Company for the conversion or loss of fifty bales of rags; and in the event that M. Rubin & Company recover from Rosenberg or any other person for the loss or conversion of said fifty bales of rags and receives funds by virtue of said recovery, we agree to refund this loan to the National Dock & Storage Warehouse Company at the same time as and in the same proportion that said recovery shall be made. This receipt involves no personal liability but simply a liability to repay from any funds recovered of Rosenberg Bros.

Witness

A. A. Ginsberg.

M. Rubin & Co.

By Joseph Rubin."

it (the warehouse company) for the conversion by the warehouse company of the fifty bales of rags in question, and that thereby the title to the rags vested in the warehouse company. That as a result Rubin and Company, at the date of the writ in the second action, had no title on which an action of conversion could be maintained.

It is plain that this defense would not have been made out if the warehouse company, recognizing Rubin and Company's claim against it, had agreed that the warehouse company might proceed in Rubin and Company's name to prosecute their (Rubin and Company's) claim against Rosenberg Brothers and if successful to hand the proceeds to them (Rubin and Company) and if unsuccessful to pay Rubin and Company's claim against it (the warehouse company) out of its own pocket. The only difference between the arrangement made and that suggested above is that the warehouse company put Rubin and Company in funds in the first instance by way of a loan. We are of opinion that this subsequent arrangement is in law what it purports to be, and that the defense is not made out.

By the terms of the report, as we interpret it, judgment must be entered in the first action for the defendant, and in the second action for the plaintiffs, in the sum of \$1,696.27, with interest from January 6, 1914, which is the date of the finding.

So ordered.

Lee M. Friedman, for the Rosenberg Brothers.

R. Homans, (*L. Goldberg* with him,) for the plaintiff Rubin and for the defendant warehouse company.

ARTHUR C. THOMSON & others, executors, vs. FREDERICK J.
CARRUTH.

SAME vs. HELEN P. JAMESON & others.

SAME vs. MARIANNA J. MARTIN & others.

SAME vs. CLARENCE STETSON.

Suffolk. March, 18, 19, 1914. — September 11, 1914.

Present: HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Will, Execution. Supreme Judicial Court. Practice, Civil, Amendment, Right to prove admitted fact. Evidence, Of intent. Witness, Corroboration.

If a person, who intends to execute an instrument as his will, after placing his signature for the purpose of identification on the margin of each of the first four pages of the instrument, proceeds in the presence of three witnesses to sign his name on the margin of the fifth page, intending it as the signature of his will, and thereupon the three witnesses sign the attesting clause prepared for them, this is a valid execution and attestation of the will, the effect of which is not impaired by the testator afterwards recalling the witnesses and in their presence signing his name at the end of the *in testimonium* clause without any further signing by the witnesses, such later signature of the testator being no part of his will.

Where an appeal from a decree of the Probate Court admitting a will to probate was tried before a single justice of this court prior to the passage of St. 1913, c. 716, so that under the provision of § 6 of that statute an amendment to the petition for the proof of the will, for the purpose of correcting the record in a technical matter, could not be allowed by the full court, an order, which overruled exceptions to the rulings of the single justice, was made conditional upon the final allowance of the suggested amendment.

At the trial, upon an appeal from a decree of the Probate Court allowing a will, of the issue, "Was the alleged will now offered for probate executed according to law?" where the executor has introduced evidence that the alleged testator signed his name on the margin of the fifth page of the instrument, intending it as the signature of his will, he may introduce further evidence, for the purpose of showing that the alleged testator signed the instrument *animo testandi*, to the effect that immediately after the signing of the instrument on the margin of the fifth page an indorsement was made on a former will stating that it was cancelled.

Upon the trial of an issue of fact, an admission by one of the parties of a certain material fact does not deprive the other party of his right to prove that fact by affirmative evidence.

Where, at the trial of an appeal from a decree of the Probate Court allowing a will, the contestants have made an attempt to show that the testimony of a certain

witness for the executor differed from that which he had given in the Probate Court, the executor may be allowed to introduce evidence of the testimony given by the witness in the Probate Court for the purpose of showing that it was to the same effect as that given by him at the trial of the appeal.

LORING, J. These are four appeals taken by different next of kin from a decree of the Probate Court admitting to probate the will of Charles Herbert Pratt.

Two issues were framed by a single justice of this court * to be tried by a jury. These issues were: "First. Was the alleged will now offered for probate executed according to law?" "Second. Was the said Charles H. Pratt of sound and disposing mind and memory at the time of the execution of the said alleged will?"

When these two issues came on for trial, "the appellants agreed that the court might withdraw from the jury the second issue above noted, and, on the evidence, would be warranted in finding, and the appellants would not contest his finding, in the affirmative on said issue." Thereupon the single justice proceeded with the trial of the first issue, and the case is here on exceptions taken by the appellants in the course of that trial.

The facts which appeared in evidence attending the execution of the will were, in substance, as follows: The instrument in question had been drafted at Mr. Pratt's request, by Joseph Cavanagh, Esquire, a member of the bar, and a preliminary copy had been sent by Mr. Cavanagh to Mr. Pratt for his consideration. Mr. Pratt was, at that time, living at the Beaconsfield Hotel. Mr. Cavanagh, on the day in question, had called upon Mr. Pratt for another purpose. While Mr. Cavanagh was there, Mr. Pratt said that he would like to execute the will then, and, after it had been read in part by him and in part had been read to him by Mr. Cavanagh, a nurse who was in attendance upon him and two officers of the hotel were called in to act as attesting witnesses. Mr. Cavanagh was not present at the execution of the will, thinking that because he was named as executor it would be improper for him to be present at that time.

There was evidence that immediately before the attesting witnesses were called in, Mr. Cavanagh had suggested to Mr.

* *De Courcy, J.*

Pratt that he had "better sign before they come, on the margin of the pages, up to the last page." That Mr. Pratt proceeded to do and he had just finished or was finishing his signature on the fourth page when Mr. Cavanagh left the room, on the attesting witnesses coming in. When the attesting witnesses were present, Mr. Pratt started to write his name between the *in testimonium* and the attestation clauses. But Miss Burrows, the nurse, stopped him. There was conflict in the evidence as to what was then said by her.

Thereupon he did write his name in the margin of the fifth page and the attestation clause was subscribed by the witnesses. After this had taken place, Mr. Cavanagh returned to the room. There was evidence that Mr. Cavanagh then said to Mr. Pratt, "You have not signed the will at the foot of the will," and thereupon Mr. Pratt said that Miss Burrows had told him that he [Cavanagh] had left directions that he was to sign in the margin, and that he did so because of those directions. Mr. Cavanagh said it was a mistake, and Mr. Pratt said, "Joe, this looks sloppy, don't it," to which he answered, "What do you mean?" and Mr. Pratt said, "To have my will go out to be seen by my friends in the Probate Court signed up here on the margin," and thereupon Mr. Pratt pulled the will toward him and took up a pen, or dipped it in the ink, and started to sign the will between the *in testimonium* and the attestation clauses. Thereupon Mr. Cavanagh stopped him and asked, "What are you going to do?" and Mr. Pratt said "I am going to put my name down here." To which Mr. Cavanagh said that he did not think he had better do that as long as he had signed it in the margin, and Mr. Pratt answered, "I don't want my will to go out looking that way, Joe." "Now," he said, "I am going to sign it there [indicating the place between the *in testimonium* and the attestation clauses] too." And thereupon Mr. Cavanagh said that he did not think that had better be done unless the witnesses were recalled, although it was not necessary since he had signed the will already, and thereupon a discussion ensued, Mr. Cavanagh urging Mr. Pratt to have a clean copy made and execute the will anew later on. This Mr. Pratt refused to do, saying that he wished to finish the matter that day, and Mr. Cavanagh said that if he insisted upon writing his name in the proper place that he would have the

attesting witnesses come back so that "those witnesses would be able to say how your name got at the bottom, as well as how it got on the side." Mr. Cavanagh then said to Mr. Pratt, "Before I do [call the witnesses back], do you tell me that you intend that [pointing to the signature on the margin] as your signature to this will?" to which he said "Yes," and thereupon the witnesses returned and Mr. Pratt wrote his name between the *in testimonium* and the attestation clauses, but the attesting witnesses did not again subscribe the will.

There was evidence upon which the jury could have found that what was said by Mr. Cavanagh when he returned to the room was, "Charlie, you haven't signed the will," and that the signature thereafter made by him was intended by him as the signature of his will and being after the attesting witnesses had subscribed their names the will was not duly attested, under the decision in *Chase v. Kittredge*, 11 Allen, 49.

That is to say, it was open to the jury to find that the signature on the margin of the fifth page was intended by Mr. Pratt as his signature to the will, but it was also open to them to find that the signature which was afterwards put between the *in testimonium* and the attestation clauses was intended by him as his signature to the will. Besides the attesting witnesses, three other witnesses were called by the executors, and no witnesses were called by the appellants.

The appellants requested the presiding justice to give nine rulings which are set forth in a note.*

* "1. On all the evidence in the case the jury should answer the question propounded in the negative.

"2. The burden of proof is upon the proponents of the will to show, by a fair preponderance of the evidence, that all the requirements of law were complied with in respect of the execution of the will; and if the jury are unconvinced or in doubt, they should answer the question submitted, No.

"3. Upon all the evidence in the case the testator did not intend his signature on the margin of any of the pages to be operative as the execution of the will, but that he intended to sign for such purpose, when he did sign, in the presence of the witnesses on their second appearance.

"4. If, upon the evidence, the jury believe that when the testator placed his signature on the margin of the fifth page of the will he did so either for the same purpose as that for which he had placed his signature on the margin of the previous pages or because Miss Burrows suggested it, still intending to

These rulings the justice refused to give in full. Exceptions were taken by the appellants to this refusal of the justice.

The executors asked for two rulings which were, in substance, given by the justice, and an exception was taken by the appellants to that part of the charge in which the justice, in substance, gave these two rulings.

These rulings were as follows: "5. If the will was validly executed on the margin, there is nothing shown in evidence which happened afterwards which affects that valid execution." "7. You are to assume, for the purposes of this case, that Mr. Pratt was of a sound mind and competent to execute his will."

The material part of the charge to the jury was as follows: "So you see we have come down now to the very narrow question. On the fifth page in the margin appears the name of Charles H. Pratt. And the question, narrowed down for you to determine, is this: When Charles H. Pratt wrote his name there in the margin of this fifth page did he intend thereby to give this instrument

sign at the bottom of the will in execution thereof, as he subsequently did, the jury should answer the question propounded, No.

"5. To answer the question propounded in the affirmative, the jury must find (a) that the testator signed on the margin for a purpose different from that for which he signed on the four preceding pages; (b) that he then intended not to sign at the bottom of the will, but to leave the space there provided for his signature unfilled.

"6. If the jury find that when the testator signed on the margin of the pages which he signed when all the witnesses were present, he intended to sign at the end, in the usual place for a testator's signature, in token of execution of his will, but inadvertently forgot to sign, they should answer the proposed question, No.

"7. If the testator intended to sign his will at the end in token of execution, but forgot to do so until the second appearance of all the witnesses, the question propounded should be answered, No.

"8. The single question in the case for the jury to determine is whether the testator, when he placed his name on the margin of the fifth page, intended that as his final signature of the will in token of execution thereof, or whether he intended to sign at the end, in the usual place, in the place signified by the will as intended for his signature. If the latter, the question must be answered, No.

"9. If the signature by the testator at the end of the will was intended to be the operative signature to authenticate the will, the jury must find, under the uncontradicted evidence in the case, that the will was not executed according to law."

effect as his last will? If he did, then your answer to this question will be Yes. If he did not, your answer will be No; because it is upon that signature, admittedly made on the fifth page, witnessed by these three witnesses, that this whole case turns. Well, now you see that is even narrower than appears, because there is no dispute [but] that he signed his name there; there is no dispute but that the three witnesses attested this instrument after he had signed his name there. So that, really, we get now, I think, about as close and narrow as we can. The question comes down to one of intent. What was the intention on the part of Charles H. Pratt when he signed his name in the margin there of that fifth page and the witnesses attested that signature? Did he intend to place it there in order to have it operate as a signature, final signature, operative signature of his will — as *the* signature of his will; not for identification, or for any other purpose? If he did, that became his will at that moment, and your answer will be 'Yes.' And the burden is upon the executor to satisfy you by a fair preponderance of the evidence in this case that that was his intention, — when he signed his name on that page, to have that writing operate as a signature to his will, making it his will."

And again: "You notice that, although this whole transaction occurred in an hour or two of the afternoon of March 28, not only was the evidence put in here as to what occurred at the time Mr. Pratt signed this paper on the fifth margin, but also what occurred afterwards when the witnesses were recalled to the room, and what occurred with reference to writing on the copy of the old will, and the conversation that occurred, and the statements that were made by Mr. Pratt afterwards. These were admitted under what lawyers call the rule of *res gestae*. That is, where the acts that are done are so intimately connected that, although they may not be identical in time, they are so closely connected with the main thing of which we are inquiring as not only to throw light upon the main act, but to be essential in order to practically understand the main act with which they are intimately connected. So we have gone into, not only what took place during those five or ten minutes that the three witnesses were in the room, but also into what took place just before and just after. Why? Not because the issue is what occurred later; not because the

issue is as to the signing at the end of the will; but only so far as the transactions that occurred during this entire meeting on the afternoon of March 28 hark back and throw light on the intention of Charles H. Pratt, at the moment when he signed his name in the margin of the fifth page, and had that signature attested by the three witnesses. It is only so far as those statements and those acts that occurred later that afternoon, and before the will was finally taken and put in the safety deposit box and carried away; it is only so far as the transactions of that afternoon bear upon and help you to determine that narrow question of the intention of Mr. Pratt when he signed on the margin of the fifth page that they are of any consequence. So far as they do help you to determine what his intention was back at that time when he made his signature upon which this will stands or falls, and only so far as they help you determine his intention at that time, are they of consequence."

On the conclusion of the charge, when the appellants took an exception to that part of the charge which adopted, in substance, the fifth ruling asked for by the executors, the stenographer, at the request of the justice, read the part to which this exception was taken, and it was in these words: "For the purposes of this case it must appear that Mr. Pratt signed this instrument as his will and that that signature was attested by the three witnesses whose signatures appear on the will in writing. And if that once became an accomplished fact, that became the operative will of Mr. Pratt, and nothing done afterwards, so far as the testimony in this case shows, would nullify it."

At their argument in this court, the appellants have undertaken to support the first ruling asked for by them and refused by the justice on the ground that the instrument offered for probate included the signature of Mr. Pratt between the *in testimonium* and the attestation clauses, and that on the contention of the executors that signature was no part of Mr. Pratt's will. For, on the contention of the executors, Mr. Pratt's will was executed when he signed his name on the margin of the fifth page and the witnesses subscribed their names under the attestation clause on page six. On this assumption the signature of Mr. Pratt between the *in testimonium* and the attestation clauses (having been made subsequent to that) was no part of Mr. Pratt's will and should

not have been admitted to probate. It appears from the exceptions that no such contention was made at the trial. If it had been made, the petition of the executors for the allowance of Mr. Pratt's will could have been amended by leaving out the signature in question. It is manifest that the point is merely technical and that the case has been fairly tried on the merits. Under these circumstances an amendment to that effect may now be allowed. But this trial took place before the St. of 1913, c. 716,* and therefore the amendment cannot be allowed by this court.

The appellants' second contention is, that an incomplete instrument cannot be allowed as the will of the deceased, and the argument put forward is that Mr. Pratt could have signed his will "in a dozen different places" and that if he had intended to sign it in a dozen different places it was an incomplete instrument until the last of the dozen signatures had been put to the will. But this contention is without foundation. The deceased may, for the purposes of identification, write his name against each of the sheets. If he does so, those signatures are not the signature of the will which is required by R. L. c. 135, § 1. A testator cannot sign his will more than once. The only question in the case at bar was (as stated by the presiding justice) whether the signature on the margin of the fifth page was put there by Mr. Pratt as his signature to the will. There is nothing in the nineteen cases cited by the appellants in this connection which requires special notice.

The appellants' next contention is that the jury "should have been instructed to find whether the testator intended to complete the writing and signing of his will by the signature at the end or by the signature in the margin, and if by the signature at the end then the will was not executed according to law, and the issue should be answered in the negative." That is what the presiding justice told the jury, with this exception, that in dealing with the issue which was on trial, namely, "Was the alleged will now offered for probate executed according to law?" the presiding justice explained to the jury that what happened afterwards was of no consequence except so far as it threw light on the intent with which

* Section 6 of that statute is as follows: "This act shall take effect upon its passage, but shall not apply to cases pending before the full court or to verdicts rendered or findings made on or before the day of its passage."

the signature on the fifth page was made. That was a correct statement, made with accuracy. To have given the ruling asked for by the contestants would have impaired the accuracy of the statement and tended to mislead the jury.

We come now to the exceptions taken to the charge in so far as they adopted the fifth and seventh rulings asked for by the executors.

So far as that part of the charge is concerned, which in substance adopted the fifth request asked for by the executor, it has been disposed of by what has been said already.

The practical effect of the agreement made by the appellants when the second issue was withdrawn from the jury was what the judge told the jury, namely, that they were to assume for the purposes of this case that Mr. Pratt was of sound mind and competent to execute his will.

In making out the first issue, namely, "Was the alleged will now offered for probate executed according to law?" the burden was on the executor to show *inter alia* that the instrument was signed by the deceased *animo testandi*. It was competent for the executor to show that immediately after the execution of the instrument now in question an endorsement was made on a former will to the effect that it was cancelled. An exception was taken to the admission of this evidence, and the appellants now undertake to support that exception on the ground that the testamentary intent was not in dispute. But if the appellants had wished to take that position, they should have had the terms of the first issue amended. The general testamentary intent was in dispute so long as the first issue remained in the form in which it had been put. The issue to be tried was the issue raised by the pleadings. Admission of parties of the fact did not deprive the other party to the litigation of the right of proving the fact which was in issue under the pleadings. *Priest v. Groton*, 103 Mass. 530. *Commonwealth v. McCarthy*, 119 Mass. 354. *Commonwealth v. Costello*, 120 Mass. 358. *Dorr v. Tremont National Bank*, 128 Mass. 349. *Dawson v. Boston & Maine Railroad*, 156 Mass. 127. *Whiteside v. Lowney*, 171 Mass. 431. *Conant v. Evans*, 202 Mass. 34.

There was an attempt made by the appellants to show that Miss Burrows' testimony in the Probate Court was different from

that given by her on the stand. For the purpose of showing that it was the same, the executors were allowed to put in evidence as to what she stated in the Probate Court, and an exception was taken by the appellants to the admission of that testimony. We are not able to see why it was not competent for the executors to show that the testimony given by Miss Burrows in the Probate Court did not contradict the testimony given by her at the trial, but was, in fact, the same.

If within sixty days from the date of the rescript the petitioners shall make a motion to amend their petition by striking out from the instrument offered for probate as the last will of Charles H. Pratt the signature between the *in testimonium* and the attestation clauses, and a motion to that effect is finally allowed, the exceptions in this case will be overruled; otherwise, the exceptions will be sustained. It is

So ordered.

S. L. Whipple & W. H. Brown, (A. C. Vinton with them,) for the appellants.

C. F. Choate, Jr., & L. R. Chamberlin, for the appellees, were not called upon.

WABAN ROSE CONSERVATORIES vs. WALTER S. HALL.

Suffolk. March 19, 1914. — September 11, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Land Court, Appeal.

Under R. L. c. 128, § 13, as amended by St. 1910, c. 560, § 1, a legatee of money under the will of a testator, whose estate is alleged to be involved in proceedings in the Land Court for a registration of the title to a parcel of land, has no interest in the land which can make him a party aggrieved by a decree of the Land Court concerning it and give him a right to claim an appeal.

LORING, J. On December 4, 1913, a decree was entered by the Land Court, registering the petitioner's title to a parcel of land in Marshfield.

On December 31, 1913, one Walter Scott Hall, not a party to the petition, filed a claim for an appeal under R. L. c. 128, § 13

(amended by St. 1910, c. 560, § 1), supported by an affidavit that he had not received notice of the proceedings before the decree was entered.

The judge of the Land Court * ruled *inter alia* that Hall was not an "aggrieved party," and the case is here on an exception taken to that among other rulings.

The petitioner's title came through a foreclosure of a mortgage made by one MacMulkin. MacMulkin took title from one George W. Emery.

Emery died in July, 1909, leaving a will by which he bequeathed \$10,000 in trust to Hall subject to a life estate to Hall's mother, Mary A. Hall. This gift in the will was followed by this clause: "As, however, I now owe said Mary A. Hall certain sums for borrowed money and for board and care; if prior to my decease I shall have paid said Mary A. Hall her said indebtedness then and in that event this bequest shall be null and void and of no effect." The mother predeceased the testator, and her executors recovered judgment amounting to \$11,151.86 from the estate of Emery for the sums due her from Emery.

The claim which Hall wishes to pursue under his claim of a late appeal is based on the following statements, which he alleges to be facts: That when the land in question was conveyed by Emery to MacMulkin, he (MacMulkin) made an oral agreement of defeasance by which he agreed to reconvey the land to Emery on payment of a debt then due from Emery to him (MacMulkin); that the petitioner took with notice of the oral agreement of defeasance; that there is now a right to redeem under the oral agreement of defeasance; that by such redemption money could be obtained from Emery's estate; and that from that money the legacy to the appellant could be paid.

We have not undertaken to state all the facts which show that Hall has not stated a case. It is enough to dispose of Hall's right to claim a late appeal from the decree registering the petitioner's title to this land, that Hall has no interest in the land. He is a legatee under Emery's will and nothing more. One who is given a legacy of money by a will does not thereby acquire any title legal or equitable to any portion of the estate real or personal

* Clark, J.

of the testator. *Pritchard v. Norwood*, 155 Mass. 539. *Flynn v. Flynn*, 183 Mass. 365, 366. Hall's right in Emery's estate (if he has any now) is the right to have the estate properly wound up and his legacy paid, and that right must be pursued in the Probate Court. *Norton v. Lilley*, 210 Mass. 214, 217.

Exceptions overruled.

C. H. Dow, for the respondent.

R. G. Dodge, for the petitioner.

JOHN B. HUNTER vs. CITY OF BOSTON & others.

Suffolk. March 20, 1914. — September 11, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Equity Jurisdiction, To compel payment of claim of materialman out of fund retained under St. 1909, c. 514, § 23. *Bond. Equity Pleading and Practice*, Parties.

A contract with a city for the construction of a bath house provided that from monthly payments to the contractor sufficient sums should be deducted and retained by the city "to settle claims for materials or labor furnished for carrying on the contract, notice of which claims, signed and sworn to by the claimants severally, shall have been filed" in the office of the city or with officers as specified in the contract. A surety company gave to the city a bond with a condition to the effect that the contractor should "faithfully furnish the material and do the work required of him by the contract." *Held*, that the provision of St. 1909, c. 514, § 23, that sufficient security for those furnishing material or performing labor for the construction of a public building for a city shall be obtained "by bond or otherwise," was complied with by the provision of the contract above described, and that, provision having been made "otherwise," the bond of the surety company was not required by nor given under the statute; and consequently that, when the contractor had become a bankrupt, a materialman to whom the contractor owed an unpaid balance had no remedy on the bond or against the surety company.

A contract with a city for the construction of a bath house provided for monthly payments to the contractor on account, subject to revision on the final settlement between the parties to the contract, and in compliance with the requirement of St. 1909, c. 514, § 23, provided that from the amount due the contractor sufficient sums should be deducted and retained by the city from the monthly payments to settle the duly filed claims for materials and labor furnished for carrying on the contract. The contractor became a bankrupt. In a suit in equity by a materialman against the city to obtain about \$560 due to him from the contractor from a fund of about \$13,350 that had been re-

tained by the city out of its monthly payments, the city in its answer claimed damages in recoupment by reason of the contractor's failure to construct the building in accordance with the specifications of the contract. It appeared that by the contractor's failure to comply with the terms of the contract the city had suffered a loss of \$4,750. *Held*, that of the amount of \$13,350 retained by the city the sum of \$4,750 never became due to the contractor, and therefore the sum of money in the hands of the city, of which the plaintiff was entitled to have a proportionate share applied to the payment of his claim, was only the difference between those amounts, that is, about \$8,600.

Where a surety company has given to a city a bond with the condition that a certain contractor who has agreed with the city to construct a building for a certain price will faithfully do the work required of him by his contract, and the contractor by his failure to comply with the terms of the contract causes the amount which would have been due to him upon his full performance of the contract to be diminished by a certain sum of money, which is more than covered by an amount of money that under the terms of the contract has been withheld by the city from the contractor by deducting it from the amount that would have been due to him upon the full performance of his work, the surety company owes nothing to the city upon its bond, because the contractor has performed in substance the condition of the bond by making good to the city his deficiency in the performance of the contract and the city has lost nothing.

In a bill in equity by a materialman against a city to compel the payment of a debt due to him from a bankrupt contractor by enforcing his right to share in a fund withheld from the contractor by the city in compliance with St. 1909, c. 514, § 23, the proper procedure is for the plaintiff to bring a suit in equity in behalf of himself and all other persons having similar claims, instead of making the other claimants defendants, as the plaintiff did in the present case.

LORING, J. The plaintiff furnished material in the construction of a bath house which one Mack (doing business under the firm name of Mack and Moore) agreed to build for the city of Boston. Mack was adjudicated a bankrupt on June 6, 1911, and at that time owed the plaintiff \$560.75. Subsequently this bill in equity was brought by the plaintiff to procure payment out of \$13,351.98 retained by the city when it made to Mack monthly payments on account, and also from a surety company who gave a bond to the city conditioned that Mack should "faithfully furnish and do everything" required of him by the contract between him and the city. The plaintiff's claim is that both the money retained and the bond given were obtained by the officers of the city in compliance with St. 1909, c. 514, § 23.* All other persons

* The statute referred to is as follows: "Officers or agents who contract in behalf of any county, city or town for the construction or repair of public buildings or other public works shall obtain sufficient security, by bond or otherwise, for payment by the contractor and sub-contractors for labor per-

who had performed labor and furnished materials in the construction of the bath house were made parties defendant to the bill. In its answer the city alleged "that since the acceptance of said building as completed it has appeared that there were certain latent defects in the construction of said building due to the failure of Mack and Moore to construct said building in accordance with the plans and specifications; that as a result thereof the defendant has suffered great damage and claims the right to recoup therefor out of the funds in its hands as heretofore alleged." The case was sent to a master* under a rule directing him "to hear the parties and their evidence, find the facts and report his findings to the court together with such facts and questions of law as either party may request."

In spite of the terms of this order of reference (directing the master to find the facts which were put in issue by the pleadings) the master failed to pass upon the issue raised by the allegation of the city that it had been damaged by a failure on the part of Mack to perform his contract. We assume that the reason for this was a ruling which the master undertook to make (although he had no authority to make it under the order of reference in this case; see *Clark v. Seagraves*, 186 Mass. 430), to the effect that the city of Boston had no right in this suit to recoup the damages suffered by it in the premises. On the coming in of the master's report the city filed a cross bill based upon these same damages, and on its motion the case was recommitted to the master to find the damages suffered by the city. In a supplementary report the master found that the damages suffered by the city by reason of the failure of Mack to comply with the terms of his contract amounted to \$4,750. A final decree † was entered on the master's report, establishing the sums (amounting to \$17,410.76) due from Mack to the several persons who had furnished material or performed labor in the construction of the bath house, and directing the city forthwith to pay over to these

formed or furnished and for materials used in such construction or repair; but in order to obtain the benefit of such security the claimant shall file with such officers or agents a sworn statement of his claim within sixty days after the completion of the work."

* Edward L. Logan, Esquire.

† Made by *Jenney, J.*

debtors of Mack their proportionate share of the \$13,351.98 retained by the city; it also directed the surety company to pay to Mack's creditors the balance of the several sums due them, it declared that the city had no right to recoup its damages in this suit, or in the cross bill, and it directed the surety company to pay to the plaintiff its costs of suit.

From this decree appeals were taken by the surety company and by the city of Boston.

1. We are of opinion that the bond given by the surety company was not given in compliance with St. 1909, c. 514, § 23, and that the surety company cannot be made liable to the plaintiff and the other materialmen.

The main argument on which the plaintiff bases his contention that the bond was given in compliance with the statute is that, by the terms of the contract between the city and Mack, Mack agreed, in case it was ascertained on the final settlement that he was indebted to the city, to pay to the city, within one month after the determination of the amount of it, the balance found to be due. But the terms of the bond are that Mack should "faithfully furnish and do everything therein required of" him. This would seem to mean "faithfully furnish the material and do the work required of him by the contract." This interpretation of the condition of the bond is reinforced by the terms of Mack's proposal to the city, which is a part of the contract between him and the city. It is there stated that the city is to pay Mack \$64,650, as full payment for doing and completing the work, "including everything furnished or done, and every injury or loss sustained, by the contractor in carrying on the work." The terms and conditions of the bond correspond to the terms of the proposal, which do not include payment of money by Mack to the city.

The provision made in the contract between Mack and the city for the retention of a portion of the monthly amount then apparently due to Mack, provides in terms that such sums should be deducted and retained (*inter alia*) "to settle claims for materials or labor furnished for carrying on the contract, notice of which claims, signed and sworn to by the claimants severally, shall have been filed" in the office of the defendant city or with its officers as specified in the contract. It is plain that this

provision was made to comply with St. 1909, c. 514, § 23. In this respect the case is like *Nash v. Commonwealth*, 174 Mass. 335, and *Burr v. Massachusetts School for Feeble-Minded*, 197 Mass. 357. The statute provides that sufficient security for those furnishing material or performing labor shall be obtained either "by bond or otherwise," not by both. In the case at bar the requirement of St. 1909, c. 514, § 23, having been complied with "otherwise" than by bond, it cannot be held that the bond was given to comply with the statute.

It follows that so much of the decree as holds the defendant surety company liable and directs it to pay the costs to the plaintiff, was wrong.

2. We are also of opinion that so much of the decree was wrong as forbids the city of Boston to recoup its damages.

It is plain as matter of law and under the terms of the contract, that the monthly payments were mere payments on account subject to revision on the final settlement between the parties to the contract. The material portions of the contract are contained in articles 6 and 7, set forth in full below in a note.*

* "Article 6. The City by the Architects, after each month during which the Contractor shall have carried on the work prior to the month of completion thereof, shall estimate and allow the value of materials owned, and placed in permanent position on the work, by the Contractor, to the date of estimate and the value of labor done on the work by him [and] shall deduct, for the final settlement under the contract, such sum as the Officer shall direct, not exceeding fifteen per cent of the estimate — such other sum as the Officer shall direct not exceeding the total amount determined by the Architect to be the reasonable expense, loss and damage of the City caused by failure of the Contractor, as determined by the Architect, to conform to and carry out the provisions of the contract and shall deduct such and all sums paid for carrying on the contract, and shall deduct all sums paid for carrying on the contract, and shall deduct and retain until the Officer shall direct the payment thereof, such sum as the Officer shall direct as being required to settle claims for materials or labor furnished for carrying on the contract, notice of which claims, signed and sworn to by the claimants severally, shall have been filed in the office of the City Clerk, or with said Officer, and claims against the City, its agents or employees, relating to the contract. If the total of the sums to be allowed, as aforesaid, exceeds by more than \$200 the total of the sum to be deducted, as aforesaid, the City, unless otherwise required by law, shall pay the balance to the Contractor within

When the fact became known that Mack never fulfilled his contract with the defendant city, it appeared that the \$13,351.98 never became due from the city to Mack. In other words it then appeared that the city never had retained in its hands the sum of \$13,351.98 as Mack's money. But that the amount of Mack's money retained by the city was \$13,351.98, less the damages, amounting to \$4,750, suffered by the city from Mack's failure to comply with the terms of the contract; that is to say, the money of Mack's in the city's hands which is available for the payment of unpaid bills due from Mack to the plaintiff and other materialmen, is \$8,601.98, and not \$13,351.98. See in this connection *American Bridge Co. v. Boston*, 202 Mass. 374.

3. It has been suggested by the plaintiff since the argument that he and the other materialmen are entitled to a recovery against the surety company on the ground that the city of Boston

one month after the determination of the balance shall have been paid by the Architect.

"Article 7. The City, by the Architect, within 61 days after the work shall have been completed, in accordance with the contract, as determined by him, shall allow the contract sum of \$64,650, and such sum as he shall determine to be the reasonable cost of extra labor furnished under orders and given as authorized in Article 2, plus 10 per cent of such cost, and the reasonable expense, injury or loss, caused by conforming to all other orders so made and given, or by anything for which, as determined by Architects, the City is liable and no other provision is made in this article, but no sum shall be allowed for loss or profits on work taken away; shall deduct and keep such sum as the Architect shall determine to be just for each day any work done for the City either by this contractor, as determined by the Architect, and such sum as he shall determine to be the expense, loss and damage of the City specified in the preceding Article, and the decrease in the total cost of the work caused, as he shall determine, by change or taking away of any part thereof; shall deduct all sums paid for carrying on the contract, and shall deduct and retain until the Officer shall request the payment thereof, such sum as he shall direct as being required to settle the claims specified in preceding Article. If the total of the sum to be allowed, exceeds the total of the sum to be deducted, the City, unless otherwise required by law, shall pay the balance to the Contractor within one month after the determination of the balance shall have been made by the Architect, and if the total of the sums to be deducted exceeds the total of the sum to be allowed, the contractor shall pay the balance to the City within on[e] month after the determination of the balance shall have been made by the Architect; any balance found as hereinbefore provided in this Article shall be deemed the final settlement under the contract."

can collect the damages due it from Mack out of either one of two funds, namely, out of the surety company or out of the \$13,351.98, which it now has in its hands, and that the plaintiff and the other materialmen, having a right to resort only to one of these funds (namely, the fund of \$13,351.98), are entitled under the doctrine of marshalling assets, to have the city collect its damages from the surety company and thus leave the whole of the \$13,351.98 fund for them. But the answer to this suggestion is that there are not two funds to which the city can resort. There is nothing due from the surety company to the city of Boston. The condition of the bond given by the surety company was that Mack should "faithfully furnish and do everything therein required of" him by the contract between him and the city. Mack performed in substance that condition when he fulfilled the terms of the contract, with the exception of certain items amounting to \$4,750, and for the payment of that he left more than \$4,750 in the hands of the city. If that were not so the plaintiff in this contention would be met with the difficulty that the surety company, being a surety on paying the city's damages of \$4,750, would be entitled to be subrogated to the city's rights against Mack. This whole contention is based upon the erroneous assumption that the \$13,351.98 was retained solely for the indemnification of the materialmen. But that assumption is without foundation.

The form of the bill in this case is not to be taken as a precedent. The proper procedure in a case like the case at bar is for one of the materialmen to bring a bill in behalf of himself and all the others, and not for him to bring a bill in his own behalf making the other materialmen parties defendant.

It follows that, so far as the decree establishes the debts due to the plaintiff and to the other materialmen, it should be affirmed, but that it should be reversed (1) so far as it forbids the city's recouping the damages suffered by it, (2) so far as it fixes the amount which the city is to pay over to the plaintiff and to the other materialmen, and (3) so far as it holds the defendant surety company liable in this suit and directs the surety company to pay to the plaintiff its costs.

The decree appealed from must be modified by providing that the city shall forthwith pay over to the plaintiff and to the other

materialmen their proportion of \$8,601.98, and by directing that the bill should be dismissed as against the defendant surety company and that the plaintiff should pay the surety company its costs. So modified, it is affirmed.

So ordered.

G. A. Flynn, for the defendant city.

L. A. Ford, (*G. G. Bacon* with him,) for the defendant Massachusetts Bonding and Insurance Company.

F. M. Carroll, for the plaintiff and certain defendants having similar claims.

E. A. Whitman, for the defendant *G. W. and E. Smith Iron Company*.

JOHN P. COLLINS vs. SETH P. SNOW & others.

Suffolk. March 20, 23, 1914. — September 11, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Contract, What constitutes. *Broker*, Commission. *Frauds*, Statute of. *Equity Pleading and Practice*, Amendment, Decree. *Rules of Court*.

If one real estate broker tells another real estate broker that he has valuable information which will enable the second broker to earn a commission and that he will impart it to him if the second broker will go ahead and do the work and will give him one half of the commission, whereupon the second broker agrees to these terms and thereafter by means of the information negotiates an important lease on which he is paid a commission, the contract to pay the first broker one half of the commission is not bad for indefiniteness and can be enforced.

If a real estate broker, in consideration of certain information imparted to him by another real estate broker, agrees that if he earns a commission by reason of the information he will give the informing broker one half of it, this is a contract that can be performed within a year and is not within the statute of frauds R. L. c. 74, § 1, cl. 5; and, if the contract with the customer under which the commission is earned provides for the payment of the commission in instalments to be paid in successive years, this does not change the character of the original contract between the two brokers.

Although in an action at law no recovery can be had on facts that happened after the date of the writ, in equity this is otherwise and rights accruing to the plaintiff after the filing of the bill which grew out of the matter on which the bill was founded may be made the subject of a supplemental bill, and accord-

ingly under Equity Rule 25 they may be pleaded by way of amendment to the original bill.

In a suit in equity, where the plaintiff had established his right to receive one half of a commission, which was payable to the defendant in instalments, and some of the instalments were not payable when the bill was filed but became payable and were paid to the defendant while the case was pending, but the plaintiff had failed to amend his bill under Equity Rule 25 by adding allegations that the subsequent instalments of the commission had been paid, it was ordered that, if within a time named the bill should be amended by adding such allegations, the decree should require the payment to the plaintiff of one half of the entire commission, and that otherwise the recovery should be limited to one half of so much of the commission as had been paid to the defendant when the bill was filed.

LORING, J. The plaintiff, who was a real estate broker, testified that he had a conversation with one of the defendant firm (who for convenience will be spoken of as the defendants), also brokers in real estate, which was in these words: "I told him that I had a valuable proposition that could be worked, and if he would agree to go to the front and do the work and give me one half of the commission I would give him the information that I had so that he could go ahead. Mr. Snow said that he would agree to that and do the work." The plaintiff further testified that he then disclosed to Snow that the owners of an estate then subject to an unexpired lease wanted to let it for seventy-five years on a ground rent of \$70,000 a year. The defendants thereupon applied to the owners to be and were employed by them as their brokers, and succeeded in letting the estate, whereby they became entitled to a commission of \$25,000. The defendants denied the contract testified to by the plaintiff, and this bill in equity was brought to reach and apply certain property of theirs in payment of the debt. The judge before whom the case was tried* believed the plaintiff and entered a decree in his favor. From this decree the defendants took an appeal; and the case is here on the evidence which was taken by a commissioner.

The first contention made by the defendants is that the arrangement testified to by the plaintiff is too indefinite to amount to a contract. In support of that contention they ask what the damages would have been if the defendants had refused to make

* *Pierce, J.*

any attempt to negotiate a lease. The fact that there could be no recovery (if there could be none) in that event is not of consequence. The promise sued on was to pay the plaintiff one half of the commission earned. It is like a promise by a manufacturer to sell to the plaintiff all goods manufactured by him during a specified time.

The second contention is that when the arrangement testified to by the plaintiff and set forth above was made, it was expected that more definite terms would be agreed upon later on; that when the subsequent terms were agreed upon and the arrangement became a contract it was a contract which could not be performed within a year and so was not enforceable by reason of the statute of frauds. Passing by the fact that the statute of frauds has not been pleaded, the facts relied upon by the defendants in making this contention are these: When the owners employed the defendants they gave them a written option in which it was stipulated that the commission to be paid in case a lease was made would be \$24,000. The commission was to be \$25,000, and the owners had forborne to require a deposit of \$1,000 on giving the option. The \$1,000 thus paid to the defendants and repaid by them to the owners made the commission \$25,000. In the written option it was stipulated that the \$24,000 was to be paid as follows: \$3,000 on September 1, 1908; \$3,000 on October 1, 1908; \$3,000 on November 1, 1908; and the remaining \$15,000 to be paid \$5,000 a year during each of the three years beginning August 1, 1909, August 1, 1910, and August 1, 1911. The written option was given on December 12, 1902. The lease negotiated by the defendants was dated November 15, 1904. If the arrangement between the defendants and the plaintiff became a contract either when the option was given or when the lease was negotiated, the contract was within the statute of frauds.

In contending that the conversation testified to by the plaintiff and set forth above was a preliminary arrangement only and not a definite contract, the defendants rely on what was drawn out by their counsel on cross-examination of the plaintiff. On his cross-examination the plaintiff admitted that he expected a special agreement at a later period, since it was a large deal. The defendants' counsel asked the plaintiff whether he did not expect "that more definite and fixed terms would be arranged

later." The defendants have assumed that the plaintiff agreed to this. But what happened was that he said, "Yes, but —" and the defendants' counsel cut in and stopped him from completing his answer. And lastly, that the plaintiff assented when asked whether the amount was not changed from \$52,000 to \$25,000 and the time of payment postponed from 1904 to 1908, and that he understood and assented to that at the time.

We are of opinion that on this evidence a completed contract was made when the conversation between the plaintiff and the defendants set forth above took place. That contract could have been completed within a year. The fact that the arrangement made under this contract which could have been completed within a year was an arrangement which could not be completed within a year is not material. The test to be applied is whether the contract when made was one which could not be completed within the year.

The defendants' last contention is that under the doctrine of *Daniels v. Newton*, 114 Mass. 530, the decree was wrong in enforcing the plaintiff's half of the instalments which fell due after the date of the filing of the bill, to wit, September 28, 1908. But *Daniels v. Newton* was an action at law. In an action at law relief cannot be given founded on facts happening after the date of the writ. In equity the rule is otherwise. In equity, rights accruing to the plaintiff after the filing of the bill which grow out of the matters on which the bill is founded may be made the subject of a supplemental bill. *Saunders v. Frost*, 5 Pick. 275, 276. *Jaques v. Hall*, 3 Gray, 194. See also in this connection *Bauer v. International Waste Co.* 201 Mass. 197. Indeed unless the original bill was dismissed that was the only way in which rights founded on subsequent facts could be enforced until the practice was changed by rule of court. *Saunders v. Frost*, *ubi supra*. By force of Equity Rule 25 all facts which before the rule were the subject of a supplemental bill now can be pleaded by way of an amendment to the original bill.

In the case at bar no such amendment has been made. It appears however that the subsequent instalments were paid by being allowed by the lessor in account with the lessee to whom the sums due as commissions were assigned by the Snows. If within sixty days from the date of the rescript in this case the bill is

amended by alleging that the subsequent instalments of the commission have been paid, the decree is affirmed with costs; otherwise, it is to be modified by limiting the recovery to one half the commission due when the bill was filed, and so modified is affirmed. It is

So ordered.

James J. McCarthy, for the defendants Snow.

C. F. Smith, for the plaintiff.

EMANUEL DREYFUS vs. OLD COLONY TRUST COMPANY & others.

Suffolk. March 24, 25, 1914. — September 11, 1914.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & CROSBY, JJ.

Contract, Construction. Corporation, Rights of shareholders under consolidation agreement. Damages, In equity.

Under a consolidation plan issued by a committee to the shareholders of three corporations, which were to be consolidated into a new corporation, all of the shares of the consolidating companies being deposited for exchange, it was provided, in regard to the shareholders of one of the consolidating companies, that a holder of preferred shares should receive an equal number of shares of the second preferred stock of the new company and that a holder of common shares was entitled to subscribe for an equal number of common shares in the new company at \$15 a share. The consolidation plan contained the provision, "Any depositor failing to pay any instalment of such subscription, as and when the same shall become due and payable, shall, in the absolute discretion of the committee, its successors or assigns, forfeit all right and interest under this plan and agreement and any instalment or instalments theretofore paid." It was provided in the plan that the depositors of the old shares should have certificates of deposit issued to them and it was contemplated that such certificates should be assignable. A holder of both preferred and common shares in the consolidating company above referred to deposited all his shares of both kinds under the plan and subscribed for a number of the new shares of common stock at \$15 a share equal to the number of his old shares of common stock. Afterwards he was notified to make payment upon his subscription and failed to pay any part of it. He transferred the certificate for his preferred shares without consideration to an assignee who presented it to the depository and demanded a transfer of the certificate of deposit so that it should stand in his own name. The committee, acting in good faith under the advice of counsel, directed the depository to refuse to transfer the certificate on the ground that the depositor of preferred shares who had assigned the certificate was in default upon his subscription for the common shares and to notify such depositor and his assignee that the committee in its absolute discretion might forfeit all of such depositor's rights under the plan unless he paid his subscription without

further delay. Upon the refusal of the depository to transfer the certificate, the assignee brought a suit in equity against the members of the committee and the depository to compel such transfer, and for damages. *Held*, that the provision of the consolidation plan quoted above for a forfeiture of "all right and interest under this plan and agreement" in case of a failure to pay a subscription for common shares referred only to all the right and interest of the defaulting shareholder in respect to his common shares; therefore, that the plaintiff was entitled to a decree for the transfer to him of a certificate of deposit representing his assignor's preferred shares; but that he was not entitled to damages.

LORING, J. This suit grows out of a plan for the purchase and consolidation of the old United States Worsted Company, the Lawrence Dye Works Company, and the Silesia Worsted Mills, Incorporated, which was issued by the individual defendants as a committee in October, 1912.

The plan begins by stating the condition of the three companies and the reasons which had led to the conclusion that it was desirable that they should be consolidated by passing into one ownership. The suit now before us has to do with the rights of an owner of preferred shares in the old United States Worsted Company, and the terms of the plan in that connection only will have to be stated at length.

The capital stock of the old United States Worsted Company was divided into preferred and common shares. In the proposed consolidation and purchase holders of preferred shares of the old company were entitled to an equal number of shares in the second preferred capital stock of the new company, and holders of common shares of the old company were entitled to subscribe for an equal number of common shares in the new company at \$15 a share, and such subscribers were entitled to one sixteenth of a share in the second preferred capital stock of the new company for each common share in the new company subscribed for.

The defendant the Old Colony Trust Company was named in the plan as depository with whom the old shares were to be deposited and by whom the new shares were to be issued. On November 16, 1912, the plan was declared operative by the committee under a power given to them in the plan.

At the time that the proposed plan was issued one Charles M. Kahn was the holder of three hundred and twenty-three preferred shares and of one thousand eight hundred and fourteen

common shares in the capital stock of the old United States Worsted Company. On October 7 he deposited all of his shares with the Old Colony Trust Company and received a certificate for three hundred and twenty-three preferred shares and another certificate for one thousand eight hundred and fourteen common shares; and at the same time he signed a subscription agreement by which he agreed to pay to the new company \$27,210. On the plan becoming operative on November 16, 1912, notice of that fact was sent by the committee to the common shareholders who had subscribed under the plan, and among others to Kahn. In this notice depositors of common shares were notified to make payment of their subscriptions. Kahn never paid any part of his common stock subscription. On December 9, 1912, Kahn indorsed the certificate of deposit for his preferred shares to the plaintiff, who seemingly made no payment to Kahn and was a volunteer merely. The plaintiff thereupon requested of the Old Colony Trust Company, at the counter, a transfer to himself of the certificate of deposit representing Kahn's preferred shares. Upon this request being made to the Old Colony Trust Company it referred the question to the committee. Later the trust company received a letter from the committee, in which the committee instructed the trust company to retain in its hands all of the second preferred shares and all the common shares in the new company to which depositors of preferred shares of the old company might be entitled under the plan, where such depositors had also subscribed to common shares but had failed to pay or thereafter should fail to pay the instalments of their common share subscriptions called by the committee; and in case such depositor of preferred shares had assigned his certificate for the same and the assignee presented the certificate with a request to transfer the same, the trust company was authorized and instructed to refuse to transfer the same on the ground that such depositor was in default in respect of his common share subscription, and to advise such depositor and his assignee that such depositor might in the absolute discretion of the committee, its successor or assigns, forfeit all right and interest under the plan, and that in the exercise of such discretion the committee might forfeit such depositor's rights to any second preferred shares and common shares as well as to certain amounts in cash which need

not be particularly stated, unless such depositor paid his subscription without further delay.

This letter was written under the advice of counsel whose standing and good faith in the matter are not questioned. Thereupon this suit was brought to compel the delivery of the certificate of deposit and to recover damages suffered by the plaintiff caused by the refusal to allow a transfer of the certificate of deposit.

The committee set up in their answer, as justifying their refusal to transfer the certificate of deposit to Mr. Kahn's nominee, this clause in the plan under which the shares were deposited by Mr. Kahn: "Any depositor failing to pay any instalment of such subscription, as and when the same shall become due and payable, shall, in the absolute discretion of the Committee, its successors or assigns, forfeit all right and interest under this Plan and Agreement and any instalment or instalments theretofore paid." The whole article of the plan, of which the paragraph set up in the answer of the individual defendants was a part, is set forth in full in the note below.*

* "VI."

"Method of Deposit."

"Stockholders of United States Worsted Company and The Lawrence Dye Works Company, who desire to assent to the provisions and to become entitled to the benefits hereof, must deposit their shares with the Depositary within the time limited by the Committee for such deposit or any extension thereof.

"Such deposits shall be made in the manner following, to wit:

"(a) Any holder of the preferred stock of United States Worsted Company and The Lawrence Dye Works Company must deposit with the Depositary his certificate or certificates of stock, duly endorsed for transfer; and

"(b) Any holder of the common stock of United States Worsted Company must deposit with the Depositary his certificate or certificates of stock, duly endorsed for transfer, and must contemporaneously with such deposit execute and deliver to the Depositary a subscription agreement, obligating himself to pay to the Committee, its successors or assigns, fifteen dollars (\$15) for each share of common stock of United States Worsted Company deposited by him.

"Such subscriptions shall be payable as and when called for by the Committee, its successors or assigns, and the form of such subscription agreements shall be such as the Committee may prescribe.

"Any depositor failing to pay any instalment of such subscription, as

The single justice by whom the case was heard * ruled that the clause under which the defendants justified (quoted in full above) referred "to the rights of the common stockholder, as such," and had "no bearing upon his rights as a holder of preferred stock." And "as this was the only question raised before me at the hearing, I ruled that there should be a decree for the plaintiff." Thereupon the plaintiff filed a motion for reference to a master to report to the court the damages, if any, sustained by the plaintiff by reason of the failure of the defendants to carry out the agreement set out in the bill. Being of the opinion that the question of the right of the plaintiff to recover any damages from the defendants, as well as the question of the correctness of the ruling made by him, should be determined by the full court before further proceedings were had, the single justice reserved the case for the full court upon the pleadings and upon certain agreed facts which were filed after the ruling stated above was made.

1. We are of opinion that the ruling of the single justice was right. The question depends upon the construction of article VI of the plan of consolidation and purchase already set forth in full in a note. The first paragraph of that article deals with all the stockholders of the United States Worsted Company, both common and preferred; it provides that if they assent to the provisions of the plan and wish to become entitled to the benefits of it, they must deposit their shares with the depository. The next paragraph is in these words: "Such deposits shall be made in

and when the same shall become due and payable, shall, in the absolute discretion of the Committee, its successors or assigns, forfeit all right and interest under this Plan and Agreement and any instalment or instalments theretofore paid.

"The Committee may limit the time for receiving deposits hereunder, and may, in their discretion, either generally or in special instances extend or renew the period or periods so fixed or limited for such further periods and upon such terms and conditions as they may see fit.

"Holders of stock not deposited within the periods fixed or limited therefor shall not be entitled to deposit the same or to become parties to this Plan and Agreement or to share in the benefits hereof, and shall acquire no rights hereunder, except upon obtaining the express consent of the Committee, who may withhold or give their consent in their absolute discretion, and upon such terms and conditions as they may see fit."

* *Hammond, J.*

the manner following: (a)." Then follows a provision as to what must be done by the holders of preferred shares in the old United States Worsted Company. Then comes a paragraph which begins with "(b)," and provides what must be done by holders of common stock in the old United States Worsted Company. It provides that any holder of common stock must "contemporaneously with such deposit" of his shares "execute and deliver to the Depositary a subscription agreement, obligating himself to pay" \$15 for each share deposited by him. The next paragraph provides that such subscriptions "shall be payable as and when called for by the Committee." That clearly has to do only with the subject of paragraph (b), namely, the duties of holders of common stock who deposit their shares under the plan. Then follows the clause here in question, on which the committee rely: "Any depositor failing to pay any instalment of such subscription, as and when the same shall become due and payable, shall, in the absolute discretion of the committee, its successors or assigns, forfeit all right and interest under this Plan and Agreement and any instalment or instalments theretofore paid." Then follow two more paragraphs, the first of which authorizes the committee to limit the time for receiving deposits, and the second provides that holders of stock not deposited within the periods limited by the committee shall acquire no rights under the plan except upon obtaining the express consent of the committee.

Undoubtedly the last two paragraphs apply to deposits of both kinds of stock. The question which we have to decide is whether the paragraph next preceding the last two is a paragraph of the same kind, applying to deposits of both kinds of stock, or is a paragraph of the same kind as the two paragraphs next preceding it, which confessedly apply to the deposit of common stock only.

The main contention of the individual defendants is that by the terms of the paragraph here in question, what the committee have a right to declare forfeited is not "all right and interest in respect of his common shares under this Plan and Agreement," but it is "all right and interest under this Plan and Agreement." And they argue that there is nothing which will justify the court in cutting down the scope of the paragraph arrived at by giving to the words used their literal meaning. We do not think, however, that that is a true construction of this clause. If the con-

struction urged by the committee is the true one, the committee had more security for the payment of the subscriptions made by common shareholders where the common shareholder in the old company was also a holder of preferred shares in the old company, than it did where the same number of shares of preferred and common were held by different persons. In the absence of a provision in the plan making by express words that distinction, the conclusion should not be reached that it was intended that there should be that difference in the two cases. More than that, it is provided in the plan that depositors shall have certificates of deposit issued to them, and it is contemplated, if not provided, that those certificates of deposit should be assignable. In the absence of an express provision it could not be inferred that the rights of the assignee under an assignable certificate of deposit to the shares to which he is entitled under that certificate of deposit should depend upon the payment or non-payment by his assignor of his subscription in respect of common shares in the old and the new companies. For this reason we are of opinion that the clause in question deals with the same persons and rights dealt with in the clause next preceding it, and that the ruling of the single justice was right.

2. At the argument before this court the individual defendants contended that independently of the forfeiture clause neither Kahn nor his transferee was entitled to the transfer of the three hundred and twenty-three second preferred shares of the new company except upon paying to the committee the \$27,210 which he agreed to pay on account of the one thousand eight hundred and fourteen common shares which he deposited under the plan.

The grounds for this contention are that it is settled that where a person has depleted a trust fund, whether by breach of trust or by simply being indebted to it, he cannot withdraw his proportion of the depleted fund; but on the contrary that the trustee can insist upon the sum which otherwise he would be entitled to withdraw being applied to make good the depletion in the fund. For a good statement of the rule see *Underhill on Trusts*, (7th ed.) 509, where the cases are collected. See also *Crocker v. Dillon*, 133 Mass. 91, 102.

When the individual defendants refused to transfer to the plaintiff the certificate of deposit representing the three hundred and

twenty-three second preferred shares in the new company, they based their refusal solely upon the right of forfeiture given to them by the clause in the plan of consolidation and sale set forth above. Not only that, but when the individual defendants filed their answer they justified on this ground alone. And finally, when the case was heard by a single justice, the only contention put forward by the individual defendants was the right of forfeiture already referred to. The contention now made was not then put forward and so was not passed upon by the single justice. By the terms of the reservation the only question reported to this court is the correctness of the ruling made by the single justice. However, we pass by the fact that this last contention of the individual defendants is not now open to them under this reservation. It is more satisfactory to rest our decision on the merits. We are of opinion that this contention of these defendants is without foundation.

Speaking with accuracy, there is no trust fund in the case at bar. Doubtless all subscriptions are held for the new corporation. So far as the assets of a corporation are trust funds there is a trust or *quasi* trust in the case at bar. We know of no case outside of a trust fund properly so called where the doctrine invoked by these defendants has been applied. The interest on which the plaintiff seeks to hold these defendants is not an equitable interest in a fund the legal title to which is in them. Kahn's interests in the new second preferred shares is a legal right, arising out of a common law contract, to shares of stock, that is to say, to the whole property itself, not to an equitable interest in it. What these defendants are asking for is to have this doctrine applicable in case of an equitable interest in a trust fund (strictly speaking) extended so as to raise a lien on shares of stock to which Kahn is entitled under a common law contract. More than that, they ask that this lien be raised by implication where a provision is expressly made whereby Kahn's obligation can be enforced, namely, the forfeiture of his subscription and all payments made under it.

We are of opinion that this doctrine should not be so extended and that the plaintiff is entitled to a decree directing the delivery to him of a certificate of deposit.

3. This brings us to the plaintiff's right to damages for the depreciation in the value of his shares since the defendants' wrongful refusal to deliver them.

Prima facie, the plaintiff would be entitled to damages if he suffered damages by reason of the wrongful refusal of the committee to transfer to him the preferred shares in the new company which he was entitled to receive under his deposit of preferred shares of the old company.

The individual defendants have contended that they are not personally liable for these damages because, if not strictly trustees, they were acting in a capacity like that of trustees and they took the proper course in refusing to transfer the stock, leaving the plaintiff to bring a suit to assert his rights under the plan. And in this connection they rely on what was said by this court in *Dimmock v. Bixby*, 20 Pick. 368, 374, 375. The contention would have been a good one had these defendants refused a transfer until the plaintiff had established his right to the stock, and had left him to bring a suit to assert his rights. But that is just what these defendants did not do. In place of refusing to act until the court should pass upon the question, they undertook to decide the question themselves and asserted a right to forfeit the shares. They cannot now escape liability for their wrongful refusal to deliver the plaintiff's property to the plaintiff because they need not have done so.

Next the committee have set up in defense of this claim for personal liability on their part the tenth article in the plan of consolidation and purchase which is set forth in full in the note.* If the terms of that article are held to mean what they say and are to be enforced, the defense is a good one. By this article it is provided that the committee "do not assume any individual

* "X."

"Limitations upon Liability of Committee."

"The Committee shall have sole control, discretion and management under this Plan and Agreement, and will endeavor to carry the same into effect, but the members of the Committee do not assume any individual responsibility for the execution of this Plan and Agreement or any part thereof, nor for the result of any steps taken or acts done for the purposes thereof, nor shall the members of the Committee be individually liable for any act or omission of any agent or employee selected by the Committee, or for any error of judgment or mistake of fact or law, or in any case except for their own individual wilful malfeasance or neglect; nor shall the members of the Committee be liable for the acts or defaults of the Depositary."

responsibility," nor shall they "be individually liable . . . in any case except for their own individual wilful malfeasance or neglect." The plaintiff contends that this clause does not protect the committee from liability in this case. The ground on which this contention rests is, to quote his own words: "Damages are not asked for by the plaintiff as an assignee of a depositor, on account of an act done by the defendants in managing property entrusted to them under the plan, in consequence of which he suffered loss, along with all the other depositors or even alone. On the contrary, the charge against the defendants is that, having received property on certain conditions, they refused to recognize the plaintiff's rights in the property after due assertion of them. In other words, the act which has resulted in loss to the plaintiff was done by the defendants, not in carrying out the plan for the plaintiff, or his assignor, but in determining the rights of the plaintiff under the plan in a controversy between the plaintiff and the defendants with respect thereto." The plaintiff relies in this connection upon the doctrine of *Knox v. Mackinnon*, 13 App. Cas. 753, *Rae v. Meek*, 14 App. Cas. 558, and similar cases. The doctrine of *Knox v. Mackinnon*, relied on by the plaintiff, is stated by Lord Watson at page 765, in these words: "I see no reason to doubt that a clause conceived in these or similar terms, will afford a considerable measure of protection to trustees who have *bona fide* abstained from closely superintending the administration of the trust, or who have committed mere errors of judgment whilst acting with a single eye to the benefit of the trust, and of the persons whom it concerns. But it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of *culpa lata*, or gross negligence on his part, or of any conduct which is inconsistent with *bona fides*. I think it is equally clear that the clause will afford no protection to trustees, who from motives however laudable in themselves act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer."

The plaintiff in making this contention has overlooked the fact that the committee were common agents. They were agents not only of the plaintiff but of all other persons who deposited shares under the plan. All persons who deposited shares under

the plan had a right to look to the committee to use their best endeavors to enforce the rights under the plan of all persons who had acquired rights under it when the plan became operative. Persons who deposited preferred shares without making a subscription had a right to look to the committee to use every means in their power to enforce the subscriptions which had been made under the plan. The committee were advised that the clause in question enabled them to enforce subscriptions by declaring forfeited the interest which a subscriber had in the second preferred shares of the new company by reason of a deposit of the preferred shares of the old company. One of the duties owed by the committee in carrying out the plan was (if this advice was right) to collect subscriptions by a declaration of forfeiture. It is evident, therefore, that the committee, in undertaking to declare forfeited the plaintiff's right to the second preferred shares of the new company by reason of his deposit of the preferred shares of the old company, were acting under the plan and not outside the plan, as the plaintiff has contended. Whatever, therefore, may be the limits of the doctrine as to the extent of the liability of persons justifying under such a clause, the defendants are justified in the case at bar. In addition to *Knox v. Mackinnon*, *ubi supra*, see in this connection *Warren v. Pazolt*, 203 Mass. 328.

It is not necessary to discuss the liability of the trust company. Without going into the matter at length, it is plain that under the plan the depositary is not liable under circumstances where the committee are not liable.

It follows that the plaintiff is entitled to a decree for the delivery of the shares* and his costs, but not to have the case sent to a master upon the question of damages.

So ordered.

* After the filling of the bill, the certificates for the second preferred shares came into the hands of the committee to be delivered through the depositary to the holders of the certificates of deposit representing such shares, so that the rescript instead of ordering the depositary to transfer to the plaintiff the certificate of deposit to which he was entitled, ordered the delivery to him of a certificate for three hundred and twenty-three second preferred shares of the capital stock of the United States Worsted Company of Massachusetts.

W. H. Best, (S. G. Barker with him,) for the Old Colony Trust Company.

J. L. Thorndike, (H. S. Davis with him,) for the defendant T. L. Pomeroy and others.

J. N. Clark, (R. H. Montgomery with him,) for the plaintiff.

ELIZABETH A. DAMM vs. INHABITANTS OF BOYLSTON.

Worcester. September 25, 1914. — September 30, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Practice, Civil, New trial.

If a motion for a new trial, which is asked for on the grounds of alleged prejudicial conversations in the presence of the jury and of alleged improper conduct of the deputy sheriffs in charge of the jury and is supported by the affidavits of persons who have appeared as witnesses at the trial, is denied by the trial judge for the reason, stated by him, that he is not satisfied of the truth of the allegations contained in the motion, his decision will not be disturbed.

BY THE COURT. This bill of exceptions relates to motions by the plaintiff to set aside a verdict in favor of the defendant on the grounds of conversations by officers of the town in the presence of the jury during the trial, and of improper conduct of the deputy sheriffs in charge of the jury after the close of the evidence and before the rendition of the verdict.

Assuming in favor of the plaintiff, but without so deciding, that exceptions were saved, it is plain that there is no error of law on this record.

The plaintiff declined to appear for an oral hearing of witnesses, and the motions were determined on affidavits and counter affidavits. The judge of the Superior Court * made a finding to the effect that he was not satisfied of the truth of the allegations contained in the motions, and for that reason denied them and refused as inapplicable certain requests for rulings presented by the plaintiff. In substance, the conclusion of the trial judge was that he did not believe that the facts set forth in the affidavits in support of

* *Lawton, J.*

the motions were true. Most of the affiants had been before him in some capacity during the trial. Manifestly he was in a better position to decide upon their credibility and upon all matters set forth in the affidavits than any one else. His findings on the facts will not be disturbed. The rulings requested related either to facts or to matters rendered immaterial in view of the findings. *Clapp v. Clapp*, 137 Mass. 183. *Commonwealth v. White*, 147 Mass. 76.

Exceptions overruled.

The case was submitted on briefs.

M. Coggan, M. S. Coggan & G. L. Dillaway, for the plaintiff.

R. B. Dodge & W. J. Taft, for the defendant.

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA vs.
COMMONWEALTH.

POCAHONTAS FUEL COMPANY vs. SAME.

CHENEY BROTHERS COMPANY vs. SAME.

LANSTON MONOTYPE MACHINE COMPANY vs. SAME.

LOCOMOBILE COMPANY OF AMERICA vs. SAME.

NORTHWESTERN CONSOLIDATED MILLING COMPANY vs. SAME.

COPPER RANGE COMPANY vs. SAME.

CHAMPION COPPER COMPANY vs. SAME.

WHITE COMPANY vs. SAME.

Suffolk. March 23, 1914. — October 7, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, SHELDON, DE COURCY,
& CROSBY, JJ.

Tax, Excise on foreign corporations. Constitutional Law, Interstate commerce, Equal protection of laws. Corporation, Foreign. Words, "Permanent property."

The constitutionality of the excise imposed by St. 1909, c. 490, Part III, § 56, on certain foreign business corporations having usual places of business in this Commonwealth, which is in effect the requirement of a license fee for the privilege of doing a local business in this Commonwealth, here was referred to as already established and was reaffirmed.

Under St. 1909, c. 490, Part III, § 70, providing that a foreign business corporation aggrieved by the exaction of an excise may, within six months after the pay-

ment of such excise, maintain a petition for the purpose of showing that such excise should not have been exacted, which shall be its exclusive remedy, such a foreign corporation is not deprived of this remedy by reason of its compliance with the requirements imposed by the statutes of this Commonwealth on foreign corporations doing business here.

The provision of St. 1909, c. 490, Part III, § 56, imposing an excise on certain foreign business corporations having usual places of business in this Commonwealth, does not apply to a foreign corporation having its place of business here only for use in interstate commerce, and there is no distinction in this regard between a corporation doing a commercial or trading business and one engaged in the business of transportation.

In determining whether a commercial or trading business is interstate, it is not of decisive consequence where the contracts are made or where the title passes.

A foreign corporation is subject to the excise imposed by St. 1909, c. 490, Part III, § 56, when it transacts in this Commonwealth domestic business substantial in its essence and reasonably susceptible of separation from the corporation's interstate commerce.

The mere fact that a foreign corporation may not be able to make profits enough on its domestic business transacted in this Commonwealth to meet the excise imposed by St. 1909, c. 490, Part III, § 56, does not make the law unconstitutional as to that corporation nor exempt the corporation from the excise.

A corporation, organized under the laws of another State, which maintains in this Commonwealth stations for the purpose of transmitting and receiving for hire wireless electric messages to and from ships on the high seas and foreign countries, and which neither transmits nor receives any messages overland or in or through this Commonwealth, is engaged exclusively in foreign commerce and accordingly is not subject to the excise imposed on certain foreign corporations by St. 1909, c. 490, Part III, § 56.

A corporation, organized under the laws of another State, whose business, so far as this Commonwealth is concerned, consists of selling by contracts made in New York coal bought in other States to customers in the New England States and arranging for its transportation to them over the high seas or by rail from the State of Virginia, such sales being arranged solely through the medium of a manager and a salesman who travel to see prospective purchasers or communicate with them by telephone or letter from an office maintained in Boston, where a stenographer is employed, is engaged exclusively in carrying on commerce "among the several States" and accordingly is not subject to the excise imposed on certain foreign corporations by St. 1909, c. 490, Part III, § 56.

A corporation, organized under the laws of the State of Connecticut for the manufacture of silk and other fabrics and for the purpose of trade, which maintains an office in Boston, with one permanent office salesman and four travelling salesmen who travel throughout New England, where a stock of samples is kept and where sales are made by sample to customers who resort there in considerable numbers, the sales being subject to approval at the home office in Connecticut, from whence the goods are shipped directly to the customers, maintains a place of business in this Commonwealth not used exclusively for interstate commerce and accordingly is subject to the excise imposed by St. 1909, c. 490, Part III, § 56.

A corporation, which is organized under the laws of Virginia, manufactures machinery at its factory in Pennsylvania and maintains an office in Boston, where

there are a manager, an office manager and four inspectors, all of whom act as salesmen and sell machines on orders which become operative on acceptance at the office in Pennsylvania, and where also a stock to replace and repair broken parts of machines is kept constantly on hand, from which parts are supplied by direct sale for about half the repairs made on the company's machines in New England, the keeping and sale of this stock in Boston being an inducement to the trade to buy these machines, conducts a local business which is wholly distinct from its interstate business although it affects the profits of that business, and accordingly the corporation is subject to the excise imposed by St. 1909, c. 490, Part III, § 56.

A corporation, organized in West Virginia, having a factory in Connecticut where it manufactures and sells automobiles and occupying in Boston a large building as an office, salesroom and repair shop, where ten persons are employed in its sales and office department and twenty in its repair department and where it keeps a stock of repair parts and repairs cars of its own make and second-hand cars that it takes in exchange for cars of its own make, maintaining there also a used-car department, where it sells cars of its own and other makes that have been taken as a part of the consideration in the sale of new cars and constantly keeps a stock of such used cars for sale, conducts a local and domestic business that is separate and distinct from its interstate business, and accordingly is subject to the excise imposed by St. 1909, c. 490, Part III, § 56.

A corporation, organized in another State and engaged in the manufacture of flour in that State, which maintains a Boston office that has charge of the business of the corporation in New England and a part of New York, where sixteen travelling salesmen are employed, seven of whom are devoted to the Massachusetts trade and all of whom, although paid by the corporation, act as agents for the domestic wholesalers in soliciting orders from domestic retailers, the corporation also keeping on hand in Boston a small stock from which it makes sales for delivery in Massachusetts, is subject to the excise imposed by St. 1909, c. 490, Part III, § 56; and the motive which influences the corporation in undertaking the business of providing agents for the wholesalers and the fact that a natural result of this business may be to increase the corporation's sales to the wholesalers are immaterial circumstances.

A corporation, organized under the laws of Michigan as a holding company, its articles of incorporation stating that its business office outside the State of Michigan is at Boston, whose property consists of the shares of a foreign copper mining corporation, the shares of a foreign railroad corporation and certain mineral lands, and whose business consists in receiving monthly dividends from its shares of stock in the foreign corporations and depositing them in Boston banks, the distribution of these receipts, after payment of officers' salaries and expenses, to its stockholders by way of dividends, and the holding of its directors' and stockholders' meetings, all of which things are done at its Boston office, is a foreign business corporation having a usual place of business in this Commonwealth and is subject to the excise imposed by St. 1909, c. 490, Part III, § 56.

A corporation, organized under the laws of Michigan to mine, smelt and refine copper and other minerals and sell them, its articles of incorporation stating that its business office outside the State of Michigan is at Boston, whose product is sold exclusively through a selling agent in New York, but whose president and treasurer have their offices in Boston, where five of its seven directors re-

side and where the directors' meetings are held, the general management and control of all its business and property being vested in its directors, although they by vote entrust the exclusive management of the company's mine in Michigan to a general manager there, transacts business in this Commonwealth which is not interstate commerce and accordingly is subject to the excise imposed by St. 1909, c. 490, Part III, § 56.

A corporation, organized in another State to manufacture and sell automobiles and there maintaining its factory, which has a local and domestic business in this Commonwealth, is none the less subject to the excise imposed by St. 1909, c. 490, Part III, § 56, because after 1903 (when St. 1903, c. 437, § 75, was in force) and before the passage of the statute of 1909, which made the excise more onerous, it bought land in Boston and built on it a large building of steel, brick and concrete especially adapted for use as a garage, this not being an acquisition of permanent property which would make the imposition of the additional excise unconstitutional as a denial of equal protection of the laws within the principle of *Southern Railway v. Greene*, 216 U. S. 400.

RUGG, C. J. These are petitions * brought by corporations organized under the laws of other States to recover excise taxes paid by each for the privilege of transacting business within the Commonwealth.

1. The foreign corporation tax law, St. 1909, c. 490, Part III, §§ 56, *et seq.*, has been upheld as a constitutional exercise of the power of the State after extended argument and thorough deliberation. *Attorney General v. Electric Storage Battery Co.* 188 Mass. 239. *Baltic Mining Co. v. Commonwealth*, 207 Mass. 381. *Keystone Watch Case Co. v. Commonwealth*, 212 Mass. 50. *S. S. White Dental Manuf. Co. v. Commonwealth*, 212 Mass. 35. On writ of error the judgments in the last two cases were affirmed in 231 U. S. 68. The only question to be determined in the cases at bar is whether under the principles already established the several plaintiffs were subject to the excise laid upon each. The tax sought to be recovered is strictly an excise tax and in no sense a property tax. It is a license fee exacted from foreign corporations for the privilege of doing in this State business other than interstate commerce. So far as any of the plaintiffs' requests for rulings seek for a re-examination or reversal of the principles established in these decisions, they rightly were denied.

2. The Commonwealth urges that each of the plaintiffs is

* Filed in the Supreme Judicial Court under St. 1909, c. 490, Part III, § 70. All the cases were reported by *Crosby, J.*, for determination by the full court.

estopped now from denying that it is within the scope and purview of this law. The ground for this contention is that each seasonably, voluntarily and without protest filed with the secretary of the Commonwealth the certificate of its condition as a foreign corporation required by § 54, and likewise appointed the commissioner of corporations its agent for the service of process in accordance with St. 1903, c. 437, § 58, and hence has acknowledged itself to be subject to the law. The principle invoked is that, where one of his own volition asks for a privilege or license, he cannot be heard to say afterward that his payment of the fee exacted was illegal and on that account seek to recover it. It relies upon *Cook v. Boston*, 9 Allen, 393, 394, *Emery v. Lowell*, 127 Mass. 138, 141, and like cases, and especially upon *Ficklen v. Shelby County Tazing District*, 145 U. S. 1, 24. But all these were cases where a fee was exacted in advance for a license issued for the transaction of a particular branch of business. In the *Ficklen* case the precise point decided was that a resident commission broker, who, after paying the required fee, had taken out a general license to do all kinds of commission brokerage for both foreign and domestic correspondents for 1887 and also had given a bond to pay in addition a percentage on all sales during that year, could not resort to the courts to compel the issuance to him of a license for the ensuing year by municipal authorities who refused because he had not complied with the bond of the earlier year on the ground that as the event had proved business had been done only for non-resident principals. The cases at bar in this respect come within the principle applied to a somewhat similar state of facts in *Atchison, Topeka & Santa Fe Railway v. O'Connor*, 223 U. S. 280, where it was held that a foreign corporation paying an excise tax was not acting voluntarily in a legal sense but was under implied duress when it was put to a serious disadvantage against the sovereignty by reason of liability to heavy penalties if in the end its contention for exemption should not be sustained. Severe penalties are provided by § 73 for each day's delay in filing returns, and by § 74 the business of the corporation may be enjoined, while by St. 1903, c. 437, § 60, the delinquent corporation is denied the privilege of maintaining actions in our courts. Somewhat summary remedies are given in the event of a failure to pay the tax. See St. 1909, c. 490, Part III, §§ 58, 62, 69.

The provision of § 70 under which these petitions are brought is that relief may be had by any corporation within six months after paying the tax, which shall be the exclusive remedy. It does not require any preliminary protest or statement of objection before filing the petition. From all these considerations the conclusion follows that the several petitioners are not prevented from maintaining these petitions because they complied with the requirements of the law as its scope was contended to be by the officers of the Commonwealth, in order to avoid the consequences of being mistaken in their own interpretation of it. The provisions of St. 1903, c. 437, §§ 58, 60, may apply in whole or in part to corporations engaged exclusively in interstate commerce. *International Harvester Co. v. Kentucky*, 234 U. S. 579. But that question is not now before us and does not affect the point here decided.

3. It was said in the course of the opinion in *Attorney General v. Electric Storage Battery Co.* 188 Mass. 239, at pages 240, 241, "If the statute before us applied to the maintenance of a place of business solely for the purpose of engaging in interstate commerce it would be unconstitutional. . . . We are of opinion that the Legislature cannot have intended to include in this statute corporations whose usual place of business is established and maintained solely for use in interstate commerce." After that decision St. 1909, c. 490 was enacted without material change in this respect, from which the inference flows that the Legislature was content with the law as interpreted by that decision. In *Baltic Mining Co. v. Commonwealth*, 207 Mass. 381, at page 390 it was said, referring to the case last cited, "In our former adjudication upon it [the statute now under consideration] we expressed the opinion that it was inapplicable to cases where a foreign corporation had its place of business here only for use in interstate commerce. It is not to be inferred that the Legislature intended the statute to go beyond the constitutional authority of the Commonwealth." What was said in these two decisions was adverted to and apparently adopted in part as the basis of decision in *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, where it was stated at page 84, "and the statute, it is held, does not apply to corporations which have places of business for the transaction solely of interstate commerce." See also

S. S. White Dental Manuf. Co. v. Commonwealth, 212 Mass. 35, at page 46.

The contention of the Commonwealth that these sentences were not intended to apply to and do not apply to corporations doing a commercial or trading business, but only to transportation corporations, cannot be supported. The decisions in which they occur did not relate to transportation corporations but to purely business corporations. The statements cannot be treated as *dicta*, for they are used as essential links in a chain of reasoning by this court upholding the constitutionality of the statute. We regard ourselves as bound by them in interpreting and applying this statute.

The Attorney General has argued in substance that the maintenance of a local office solely for a purpose connected with interstate commerce is such a doing business within the State as subjects a corporation to the license fee required by this statute. Reliance in this regard is placed especially upon the words in *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, at page 184, to the effect that the State has a right to exact a license fee of a foreign corporation for maintaining "an office in the Commonwealth for the use of its officers, stockholders, agents, or employees." But as was explained in *McCall v. California*, 136 U. S. 104, at page 112, that decision was not intended to impinge upon the equally well settled principle that "the only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or when its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by State authority." Expressions to be found in *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 317, *Wolff Dryer Co. v. Bigler & Co.* 192 Penn. St. 466, *Davis & Rankin Building & Manuf. Co. v. Dix*, 64 Fed. Rep. 406, 413 and *Attorney General v. Bay State Mining Co.* 99 Mass. 148, 153, relied on by the Attorney General, must be regarded as subject to this limitation. In principle that question is concluded by *Norfolk & Western Railroad v. Pennsylvania*, 136 U. S. 114, and *McCall v. California*, 136 U. S.

104, when read in the light of the numerous definitions (presently to be examined) of commerce between the States given by that court. Such a place of business in common with all others, whether of citizens or aliens, perhaps might be required to pay a license fee, but that question is not presented. The conclusion is that the maintenance by a foreign corporation of a local office solely for use in interstate commerce does not render it liable to the excise tax of the statute under consideration.

4. What constitutes "commerce . . . among the several States" within the meaning of those words in the Federal Constitution has been defined by the Supreme Court of the United States. Said Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 189, 190, "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches." In *County of Mobile v. Kimball*, 102 U. S. 691, at page 702 occurs this definition: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, it was said, "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions." In *Robbins v. Shelby County Taxing District*, 120 U. S. 489, at page 497, it was said that "the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." *Kidd v. Pearson*, 128 U. S. 1, 20. *Lottery Case*, 188 U. S. 321, 352, 353. *Swift & Co. v. United States*, 196 U. S. 375. *Diamond Match Co. v. Ontonagon*, 188 U. S. 82. It is apparent from this review of decisions that the interstate commerce regulation which is under the exclusive control

of Congress and which cannot be affected by any discriminatory State law, includes not merely transportation but the other inherently necessary incidents of purchase and sale of goods. Nor is it of decisive consequence in this connection where the contract is made or where the title passes. As was said in *Dozier v. Alabama*, 218 U. S. 124, at page 128, "But as was hinted in *Rearick v. Pennsylvania*, 203 U. S. 507, 512, what is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed." *Caldwell v. North Carolina*, 187 U. S. 622. *Savage v. Jones*, 225 U. S. 501, 520. *Crenshaw v. Arkansas*, 227 U. S. 389. *Rogers v. Arkansas*, 227 U. S. 401. *Stewart v. Michigan*, 232 U. S. 665.

5. The petitioners have emphasized somewhat in argument the phrase in 231 U. S., at page 86, to the effect "that local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial," and have sought to infer therefrom that a new limitation has been imposed upon the power of the States. This conclusion does not follow. The sentence probably was intended only as a reference to a fact which existed in the cases then before the court, although not one decisive in any respect as to the conclusion reached. But given its full force, it is nothing more than a statement that a shadow cannot be made the basis of an excise tax. But when the local and domestic business exists, then an excise may be levied. There is nothing to indicate that a comparison between the total business of the company and its local business was intended. Such a basis has never before been intimated. It is directly contrary to *Ficklen v. Shelby County Taxing District*, 145 U. S. 1. See also *Flint v. Stone Tracy Co.* 220 U. S. 107. If such a principle exists in reference to any facts, it has no relation to any of the cases at bar. The test is whether the foreign corporation transacts domestic business substantial in its essence and not by comparison, and reasonably susceptible of separation from its interstate commerce. If it does, the State can fix its own terms so far as license fee is concerned.

6. The ratio of profits on the domestic business to the license tax is an immaterial circumstance. If the license fee imposed is general in its operation and is in other respects invulnerable, the mere fact, that some foreign corporation may not be able to make

profits enough to meet it, does not render the law unconstitutional as to that corporation. The opportunity to do business subject to the protection of our laws and with all the advantages which arise from our markets and our financial and other resources, is the thing which is made the subject of the excise. *United States v. Singer*, 15 Wall. 111. *Flint v. Stone Tracy Co.* 220 U. S. 107, 166, 167.

Both upon this point and the one last discussed the petitioners rely on the statement in *United States Express Co. v. Minnesota*, 223 U. S. 335, 348, to the effect that if the amount of the tax is "unduly great, having reference to the real value" of the property engaged in the business, and on that in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 42, referring to a tax "not at all disproportioned to such local business." See *S. S. White Dental Manuf. Co. v. Commonwealth*, 212 Mass. 35, 44. These tests well may be used as aids in determining whether the general scheme of an excise statute is an honest attempt to raise legitimate revenue, or whether it is "a mere device to reach and burden the interstate commerce of the company." But when the general scheme of the statute has been upheld as not out of harmony with the Federal Constitution, then it cannot be stricken down because in a particular instance the excise may seem large. *New York v. Roberts*, 171 U. S. 658, 661, 663. *Pullman Co. v. Kansas*, 216 U. S. 56, 66, 67. *Ohio Tax Cases*, 232 U. S. 576, 592.

It remains to consider the several cases at bar in the light of these governing principles.

7. The Marconi Wireless Telegraph Company of America is organized under the laws of New Jersey. It maintains in Massachusetts near the ocean three wireless stations, each consisting chiefly of a high pole having at the top a wire or wires with bare ends, from which are sent through and taken from the air currents of electricity, whereby messages are transmitted and received. Connected with this apparatus are rooms similar to ordinary telegraph stations, for use of the wireless telegraph operators. At each station it transmits and receives wireless messages for hire to and from ships on the high seas and foreign countries. It neither transmits nor receives any messages whatever over land or in or through this Commonwealth. It has no property in the Commonwealth, except that above described.

It is plain that this petitioner is engaged exclusively in foreign commerce. Transmission of intelligence by means of the electric telegraph has been held to be commerce. *Pensacola Telegraph Co. v. Western Union Telegraph Co.* 96 U. S. 1. *Telegraph Co. v. Texas*, 105 U. S. 460. *Leloup v. Port of Mobile*, 127 U. S. 640, 645. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1. The sending of the means of education by correspondence through the mails also is commerce. *International Text Book Co. v. Pigg*, 217 U. S. 91. The same principle governs the transmission of ideas, thought and news by the recently discovered instrumentality which has harnessed in its service "the sightless couriers of the air" to perform between its stations without visible highway the functions previously executed by electricity only when confined to wire as a conducting medium. This petitioner transacts no business of a domestic or local nature, except such as is inseparable from and necessarily incidental to its foreign commerce. Hence it is not within the purview of the statute.

8. The Pocahontas Fuel Company is established under the laws of West Virginia. Its business is the buying and selling of coal and coke. At its office in Boston is a manager who has charge of New England business and who is paid by check from New York, a salesman and a stenographer. Records of sales are kept at the Boston office and an average deposit of \$1,000 is kept in a local bank for the expenses of this office. Correspondence and telephoning respecting sales is done from this office. Customers do not come to the office, but are called upon by the salesman, who sends all orders to New York, where they must be accepted and approved before the sale takes place. Goods are shipped to customers f. o. b. Norfolk, Virginia. The local office, in making contracts for delivery in Massachusetts, arranges charter parties for boats in the customer's name. All payments by customers are made by remittances by check to New York. This company has none of its goods or property in the Commonwealth, except office furniture, and there is no treasurer here. The description of business done at the Boston office, as shown by the agreed facts, is somewhat meagre, but it does not appear to include anything more than interstate commerce. No stock of goods is kept here. There is no local shop or store as a general resort for customers and the conduct of the essential details of

trade. It does not manufacture nor mine but buys its stock from other companies and, although not distinctly stated, it may be inferred that such purchases do not occur in Massachusetts. Its business, so far as this Commonwealth is concerned, consists of selling by contracts made in New York coal bought in other States to customers in the New England States and arranging for its transportation to them over the high seas or by rail from Virginia, solely through the medium of a manager and a salesman who travel to see prospective purchasers or communicate with them by telephone or letter from its Boston office. That which this company does in Massachusetts seems to be rationally connected with interstate commerce. The sole business which this company appears to carry on is "commerce . . . among the several States" as that phrase has been defined in judgments by which we are bound. The keeping of an office and a local bank account and the employment of a stenographer are incidental instrumentalities reasonably necessary to the conduct of this interstate commerce, and hence inseparable from it. This is not a case where the corporation by the form of its contracts or the details adopted for the doing of its business has attempted to convert into a form resembling interstate commerce that which in its intrinsic substance is local business subject to State control. Hence, *Browning v. Waycross*, 233 U. S. 16, where that thing was essayed, is not in point. This case seems to be covered in principle by *McCall v. California*, 136 U. S. 104; *Norfolk & Western Railroad v. Pennsylvania*, 136 U. S. 114; *Crenshaw v. Arkansas*, 227 U. S. 389; *Rogers v. Arkansas*, 227 U. S. 401; *Stewart v. Michigan*, 232 U. S. 665; *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304. It follows that it is entitled to prevail in this proceeding.

9. The Cheney Brothers Company is organized under the laws of Connecticut for the manufacture of silk and other fabrics and for the purpose of trade. It maintains in Boston an office and salesroom with one office salesman and four other salesmen who travel through New England. No bookkeeper is employed, no books are kept except copies and records of orders, and no collections are made. The only deposit of funds is for the expenses of the office, amounting usually to about \$250, which is sent from the treasury in New York. The salaries of salesmen and rent of

office are paid directly from the Connecticut office. A stock of samples is kept, but no other goods. The salesmen take orders, which are subject to approval by the home office in Connecticut, and the goods are shipped directly from Connecticut to the customer. The contract of sale is completed in Connecticut, where the title passes. This description of the place maintained by the corporation in Boston, and the character of business transacted there shows something outside interstate commerce. A fixed abode has been established, which is used as the headquarters for its New England business. It is almost a necessary inference from the maintenance of an "office and salesroom" with one permanent salesman, that customers resort thither in considerable numbers for the purpose of examining samples and placing orders. It reasonably may be assumed that here also are fixed all the terms of a very substantial number of sales, and that the only thing required to complete the transaction is the bald approval by the company at its home office. It is not only a permanent home for the corporation for the carrying on of its New England sales business, but it has many of the characteristics of a local salesroom. The stock of samples kept on hand is large enough apparently to require the constant attendance of one salesman. It was said by Mr. Chief Justice Waite in *Robbins v. Shelby County Taxing District*, 120 U. S. 489, at page 500, "I cannot believe that if Robbins had opened an office for his business within the Taxing District, at which he kept and exhibited his samples, it would be held that he would not be liable to the tax, and this whether he stayed there all the time or came only at intervals." These words were used in a dissenting opinion. But they embody a thought by way of hypothesis which evidently was regarded as too plain to be challenged.

Five salesmen are attached to these Massachusetts headquarters; one stationed there permanently; while four others also travel throughout New England. New England is a perfectly well understood geographical term which includes Connecticut, the domiciliary State of the corporation. Since the agreed facts show that the travelling salesmen attached to the Boston office "cover" Connecticut as well as the other New England States, it follows that this local domicile is used in part at least for the transaction of business between the Cheney

Brothers Company, domiciled in Connecticut, and other residents of Connecticut. Apparently the orders from residents of Connecticut are registered, copied and forwarded to the Connecticut office of the corporation through the Boston office. Such orders may be taken by the travelling salesmen from purchasers in Connecticut or at the salesroom directly from Connecticut customers who go there in person. Plainly, the sale and delivery of goods by a Connecticut corporation to a citizen of Connecticut does not become interstate commerce merely because the order may have been transmitted through a sales agency of the corporation located in Massachusetts. This especially is true where the sale is consummated in Connecticut by acceptance of the order and the passing of the title in Connecticut, as is said in the agreed facts to be the course of business. *Lehigh Valley Railroad v. Pennsylvania*, 145 U. S. 192. *United States Express Co. v. Minnesota*, 223 U. S. 335, 341. That there is nothing inconsistent with this conclusion in *Hanley v. Kansas City Southern Railroad*, 187 U. S. 617, is established by *Ewing v. Leavenworth*, 226 U. S. 464.

Some of these circumstances singly are enough to show that the place maintained by Cheney Brothers Company in Boston was not used exclusively for interstate commerce. Combined together, they lead to the conclusion that it is not entitled to prevail in this proceeding. The recognition of the existence of the corporation in Massachusetts to the extent here shown, by permitting it to maintain an office for the general use of its employees, agents and customers and the storage and display of samples of its products, "was a matter dependent on the will of the State," who could affix to the favorable exercise of its volition the conditions set forth in the corporation excise tax law. *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 186. *New York v. Roberts*, 171 U. S. 658. *Reymann Brewing Co. v. Brister*, 179 U. S. 445. *Horn Silver Mining Co. v. New York*, 143 U. S. 305. *Attorney General v. Bay State Mining Co.* 99 Mass. 148. The record reveals nothing to bring this corporation within any of the exceptions to this general rule discussed in *McCall v. California*, 136 U. S. 104, *Norfolk & Western Railroad v. Pennsylvania*, 136 U. S. 114 and kindred cases.

10. The Lanston Monotype Machine Company, organized under the laws of Virginia, manufactures machinery at its factory in

Philadelphia, Pennsylvania. It maintains an office in Boston, where there are a manager and office manager and four inspectors, all of whom act as salesmen. The machines are all sold on orders subject to cancellation within seven days sent to the home office in Philadelphia and accepted there before becoming operative, and thence the machines are shipped directly to the purchasers, with a bill of lading delivered by the local bank to the purchaser when he makes his initial payment. Stock to replace and to repair broken parts of the machines is kept constantly on hand at the Boston office and is replenished weekly from Philadelphia. From this stock in Boston parts are supplied by direct sale for about half the repairs made on the company's machines in New England, amounting to about \$12,000 per year. The keeping and sale of this stock in Boston is an inducement to the trade to buy these machines. The petitioner's competitors keep no such stock of parts. These facts show the transaction of a very considerable local or intrastate business as distinguished from its interstate commerce. While there may be economies of management or advertising advantages arising from it in conjunction with the interstate business of the company, there is no necessary or inherent connection between the two. Because the interstate commerce may not be profitable except in connection with local business does not so interlock the two that they are inseparable. The protection afforded by the Federal Constitution to interstate commerce against State excise taxation does not go to the extent of permitting one engaged in interstate commerce to compete in local business free from liability to an excise to the State merely for the sake of greater profit, or even of making the difference between profit and loss in the business as a whole. Plainly this local business of replacing broken parts is conducted in a manner wholly distinct from the interstate business. The distinction is not whether a profit is made by the conjoining and a loss suffered by separating the intrastate and the interstate commerce, but whether the nature of the business is such that the company is free to renounce the domestic business if it chooses and still conduct its interstate commerce. That which was said in *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, at page 86, is aptly expressive of the situation disclosed on this petition, namely, "It is apparent" that the corporation "is carrying on a purely

local and domestic business quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business." This case also is governed by *Attorney General v. Electric Storage Battery Co.* 188 Mass. 239, where the facts were nearly identical. It there was said by Knowlton, C. J., at page 241, "While the statute is inapplicable to any business or place which belongs entirely to interstate commerce, it is applicable to the defendant, a corporation engaged in interstate commerce, which has, at the same time, a place of business for other purposes. The principle has been recognized repeatedly by the Supreme Court of the United States in similar cases. *Osborne v. Florida*, 164 U. S. 650. *Pullman Co. v. Adams*, 189 U. S. 420." *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304.

11. The Locomobile Company of America, a West Virginia corporation, is authorized to manufacture, buy, sell and deal in automobiles and to carry on general business. Its factory is in Bridgeport, Connecticut, where its business is the manufacture and sale of automobiles. In Boston it occupies an office, sales-room and repair shop for the purpose of repairing cars of its own make and second hand cars taken in exchange for its own make. It occupies a large building and employs thirty persons, ten of whom are in the sales and office department and twenty in the repair department. Its method of conducting its sales of new cars is for orders to be taken by its Boston agent and transmitted to Bridgeport, whence cars are shipped to the Boston agent, who makes deliveries in accordance with orders. It does not appear, moreover, that separation of an automobile for a particular purchaser is made until the car reaches Boston, although no shipments of cars are made into Massachusetts "except cars used in fulfilment of orders . . . previously given and approved." In two thirds of the sales of new cars the purchaser pays the entire price in cash on or before the delivery of the car, while in the remaining third "the company accepts, as a part of the consideration, a car of whatever make, previously used by the purchaser." The company maintains at its place of business in Boston a used-car department, where it sells cars of its own and other makes

taken as part consideration in the sale of new cars. A stock of such cars is constantly kept for sale. The business of the used-car department for the year during which the excise in question was levied amounted to \$41,000 out of a total business of \$246,000 done by the company in Boston during the same period. The petitioner also keeps in its Boston repair shop a stock of repair parts used in repairing its own make of cars whether sold in Boston or elsewhere. The repair stock kept on hand amounts to \$6,000 and the repairs made annually to \$7,500. Testimony was offered to the effect that this was the usual course of business of all automobile companies and that an abandonment of either the used-car business or the repair business would impair the sales of new cars. This narration of facts makes it plain that this petitioner is carrying on a very considerable local and domestic business quite separate and distinct from its interstate business. The petitioner contends that this domestic business is inseparable from its interstate commerce and hence that it is beyond the control of the statute. It was said in *Pennsylvania Railroad v. Knight*, 192 U. S. 21, at 28, that "Many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it." The repair part of this company's business comes within the facts before the court in *Attorney General v. Electric Storage Battery Co.* 188 Mass. 239, and is concluded by that decision. Moreover, the sale of second hand automobiles is a business by itself. In effect the taking of a second hand machine as part payment for a new one is an investment of part of the proceeds of the sale of the new car. The keeping of these cars in stock and making sales from them is a domestic business and is not interstate commerce nor inseparably connected with it. There is ground for the argument that the transactions as to the new automobiles being shipped to its agent in Boston and separated and delivered to the several purchasers there and paid for there do not constitute interstate commerce, but sales from a local stock replenished by shipments. Apparently there is or may be no apportionment of any particular automobile until it is made by the agent in Boston, for the order may not identify a specific machine. See *Caldwell v. North Carolina*, 187 U. S. 622. But it is not necessary to discuss nor decide this point for the other branches of this company's business which have

been described are domestic and separate from this if it be assumed to be interstate. This case comes plainly within the principles established in *S. S. White Dental Manuf. Co. v. Commonwealth*, 212 Mass. 35; *S. C.* 231 U. S. 68.

12. The Northwestern Consolidated Milling Company is a corporation organized under the laws of Minnesota. It is authorized by its charter among other things to manufacture and sell flour. Its mills are located in Minnesota. It maintains a Boston office which has charge of the business of the company in New England and a part of New York. Sixteen travelling salesmen are connected with the office, seven of whom are devoted to the Massachusetts trade. These salesmen take orders for flour and other grain products from retailers. These orders are turned over to the nearest wholesale dealer, and the petitioner has nothing further to do with them. The situation is that the salesmen in the employ of the manufacturer are soliciting business for the wholesaler by whom they are not employed. The wholesaler fills from his stock the orders given by the retailer through these salesmen and the retailer pays him. These transactions are wholly between the domestic wholesaler and the domestic retailer. The wholesalers buy their stock from the petitioner by order to the Boston office. Such orders are sent to the petitioner in Buffalo or Minneapolis, and the goods are shipped to the wholesaler. In no case is there any approval of orders by the home office. One half of the sales from the Boston office are for delivery in Massachusetts. The petitioner keeps on hand in Boston a small stock from which it makes sales for delivery in Massachusetts. The major part of the petitioner's business in Massachusetts is furnishing salesmen to act as agents for the domestic wholesalers in soliciting orders from domestic retailers. This is in substance the business of providing agents for the wholesalers. The business done by the wholesaler and the retailer is a domestic business. The business of the petitioner is chiefly in aid of this domestic business, and partakes in no respect of interstate commerce. The motive which influences the petitioner in undertaking this business is inconsequential in determining whether it constitutes interstate commerce. The fact that a natural result may be to increase the sales of the petitioner to the wholesalers is an immaterial circumstance. It is too remote

from the actual business of the petitioner's salesmen to make that interstate commerce. Its sales of goods directly from local stock is also domestic, and not interstate in character. There is strong ground for the argument that this company also might be subject to the excise, because the orders from wholesalers are received and accepted, and the transaction in substance consummated at the Boston office. But it is not necessary to pass upon this point, because the manifestly domestic business of the petitioner of very considerable proportions renders it subject to the excise tax.

In none of the cases considered under paragraphs 9 to 12 both inclusive of this opinion is the intrastate business more intimately connected with interstate commerce than in *Allen v. Pullman's Palace Car Co.* 191 U. S. 171, *Pullman Co. v. Adams*, 189 U. S. 420, *Osborne v. Florida*, 164 U. S. 650, *Pennsylvania Railroad v. Knight*, 192 U. S. 21, *Browning v. Waycross*, 233 U. S. 16, in each of which it was held that the two were separable for purposes of a State excise on the domestic business.

13. The Copper Range Company is organized under the laws of Michigan. Its articles of association state that "the place where the business office of this corporation is located, without the limits of the State of Michigan, is Boston, Massachusetts." This petitioner is a "holding company" whose chief asset is stock in a foreign copper mining corporation, and it also holds the stock and bonds of a Michigan railroad and certain mineral lands. It transacts no commerce either here or elsewhere. Its activities in Massachusetts consisted in receiving monthly dividends from its stock in foreign corporations and depositing them in Boston banks, and the payment of these receipts, less officers' salaries and expenses, to its stockholders by way of dividends. Substantially its entire capital stock is owned by the Copper Range Consolidated Company, whose treasurer is also the treasurer of the petitioner. Its directors' meetings are held three or four times a year in Boston, and its annual stockholders' meeting is also held there. It declares and pays dividends several times annually. The president and treasurer are residents of Massachusetts, and it keeps its corporate records and financial books of account here. It does not appear expressly, but it fairly is inferable from the fact that its treasurer's office is here and its

accounts are kept here, that its assets also are kept here. The only question involved in this case is whether the petitioner is doing business in this Commonwealth. Apparently the main business of the corporation is conducted in Massachusetts. A holding company commonly has no business except the holding of its directors' and stockholders' meetings, the receipt of dividends and other income, the payment of its salaries and clerical and office expenses and the distribution of its profits among its stockholders. All of these functions are transacted in Massachusetts. It is significant of the view which the petitioner's incorporators had of its relation to Boston that they stated in their articles of association that its business office outside of Michigan was at Boston. It hardly could be contended that this was not a business corporation. It belongs to no other class of corporations known to the law. The performance of these functions in this Commonwealth constituted a doing of business within the Commonwealth. *McCoach v. Minehill & Schuylkill Haven Railroad*, 228 U. S. 295, manifestly is distinguishable. The place where these activities are carried on properly may be termed a usual place of business. Although the legal domicil of the petitioner is in Michigan, its substantial home appears to be in this State, where its essential corporate faculties are exercised. The exaction of a license fee for the transaction of these corporate functions is within the power of the State. *Pullman Co. v. Adams*, 189 U. S. 420, 422. *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68.

14. The Champion Copper Company is organized under the laws of Michigan, to mine, smelt and refine copper and other minerals, and to sell the same. Its articles of association state that the "place where the business office of this corporation is located, without the limits of the State of Michigan, is Boston, Massachusetts." It owns a copper mine in Michigan, where its copper is mined. Its product is sold exclusively through a selling agent in New York which represents the petitioner only with respect to making the contracts of sale and the collections from purchasers and remitting the proceeds to the treasurer of the petitioner. Deliveries under contracts of sale are exclusively under the direction of the petitioner's treasurer. The petitioner maintains its treasurer's office in Boston for the purpose of gen-

eral direction of the deliveries of copper in accordance with contracts made by its sales agent, and for the purpose of informing its sales agent as to amounts of copper to be sold and the prices, and for the necessary bookkeeping in connection with sales and deliveries, and for the deposit of funds received from all sources in Boston and other banks, the payment of its office expenses and salaries of its officers, and the distribution of dividends among its stockholders. The president and treasurer have their offices in Boston, and five of its seven directors reside in Massachusetts, where also directors' meetings are held during the year. At such meetings reports are submitted and dividends declared and votes passed authorizing the execution of deeds, conveying rights of way and other easements in land in Michigan. The company's mine in Michigan is by vote of its board of directors under the exclusive management of a general manager resident in Michigan. But the general management and control of all the business and property of the petitioner is vested in its directors. This summary of the transactions of the petitioner in Boston shows that it is transacting business there which is not interstate commerce. The articles of association manifest a purpose to maintain a business office in Boston. The functions performed by the president, treasurer and directors are such as commonly are essential to the operation of a business corporation. A considerable portion of the business transacted in Boston relates to matters quite unrelated to interstate commerce. It may be an interesting question whether a foreign corporation can select any place attractive from financial, economic, or other reasons, and establish there the management of all its interstate commerce, and seek immunity from any license for this privilege under the commerce clause of the Federal Constitution, when there is no direct connection between such place and its interstate commerce. We do not understand that *McCall v. California*, 136 U. S. 104, and *Norfolk & Western Railroad v. Pennsylvania*, 136 U. S. 114, go to this extent. But it is not necessary to discuss this question nor to determine whether the exercise by the treasurer over the sales agent and the other instrumentalities of sale constitutes interstate commerce, *Baltic Mining Co. v. Commonwealth*, 207 Mass. 381, 387, *United States v. E. C. Knight Co.* 156 U. S. 1, because apart from these considerations the corporate activities

conducted at Boston constitute a doing of business which has no direct relation to commerce. The entire corporate potentiality dwells in the Boston office. Its executive officers are there. The responsibility for its management as a corporation rests upon those whose headquarters are there. Respecting the effects of our excise law upon such a state of facts, the language of *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, at page 184, is apposite: "It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents, or employees. . . . The exaction of a license fee to enable the corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its Legislature." *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68.

15. The White Company is an Ohio corporation, organized to manufacture and sell automobiles. Its manufactory is in Ohio. It admits that it has a real and substantial local and domestic business. Its petition raises no question under the commerce clause of the Federal Constitution, but it avers that it is denied the equal protection of the laws. Such protection is assured to it, by the Constitutions both of this Commonwealth and of the United States. Its contention rests on these facts. After 1903 (when St. 1903, c. 437, § 75, was in force) and before 1909 it acquired land in Boston, and built thereon a seven story building of steel, brick and concrete. It was especially adapted for use as a garage, and gasoline tanks, elevators and a turntable were installed, the total investment approximating \$175,000. Adjoining property was acquired and remodelled and adapted for an automobile service station. This latter estate has not been occupied for several years, nor leased or sold, although it has been for lease or sale. The license fee exacted by the laws of the Commonwealth from foreign corporations has been made more onerous by the statute of 1909. The petitioner contends that these facts bring it within the principle established by *Southern Railway v. Greene*, 216 U. S. 400.

The real estate acquired by this petitioner is of a kind adapted to a very considerable and increasing business, in which there is general competition. The storage and care of automobiles and the performance of necessary service for their repair, mainte-

nance and operation is a widespread business in which large amounts of capital are invested and considerable numbers of persons are engaged. Such establishments are frequent subjects for lease and sale. There is nothing to indicate or to warrant the inference that the petitioner's investment in real estate is not readily salable at reasonable prices. It is not property of a nature irretrievably devoted to a limited and monopolistic use, and not readily available either for other valuable uses or to other persons ready to devote it to the same uses at prices fairly equivalent, subject to the general vicissitudes of business conditions, to the original investment. The Greene case related to railroad property, which is not susceptible of use for any other purpose without great loss. In that opinion it was said, "It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. . . . The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed." 216 U. S. at page 414, citing *Ames v. Union Pacific Railroad*, 64 Fed. Rep. 165, 177. In *S. S. White Dental Manuf. Co. v. Massachusetts*, 231 U. S. 68, at page 88, it was said respecting a similar contention: "The conditions existing in the *Southern Railway Co. v. Greene* case are not presented here. . . . We do not find in this situation an acquisition of permanent property, such as was shown in the Greene case." The facts in the case at bar are indistinguishable from those before the court in that case. "Permanent property," as these words were used in the opinion in the *White Dental Company* case referring to the Greene case, we interpret to mean at least a kind of property, ownership of which is inherently necessary for the establishment of the business, which must abide in the same ownership, and which cannot in the nature of things be sold in the general market so as to yield a fair return for the cost, less its normal depreciation. At all events, the Greene case does not exonerate this petitioner from liability to the excise.

Moreover, there is nothing to indicate that the purchase of real estate and the construction of a building were indispensable features of its initial admission to do business here. It is common knowledge that business like that of the petitioner often is conducted on leased property. There is a wide difference between

business of that sort and the operation of a railroad, which imperatively requires a roadbed and track.

The conclusion here reached seems to be supported also by *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, and *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28.

What has been said disposes of all the cases. It is not necessary to follow in detail the numerous requests for rulings. So far as they apply to any of the cases, the material principles to which they call attention have been discussed. Let entries be made for judgment in the several cases as follows:

Marconi Wireless Telegraph Company of America v. Commonwealth,
Decree for the petitioner with costs.

Pocahontas Fuel Company v. Commonwealth,
Decree for the petitioner with costs.

Cheney Brothers Company v. Commonwealth,
Petition dismissed with costs.

Lanston Monotype Machine Company v. Commonwealth,
Petition dismissed with costs.

Locomobile Company of America v. Commonwealth,
Petition dismissed with costs.

Northwestern Consolidated Milling Company v. Commonwealth,
Petition dismissed with costs.

Copper Range Company v. Commonwealth,
Petition dismissed with costs.

Champion Copper Company v. Commonwealth,
Petition dismissed with costs.

White Company v. Commonwealth,
Petition dismissed with costs.

The cases were argued at the bar in March, 1914, before *Rugg, C. J., Hammond, Loring, Sheldon, & Crosby, JJ.*, and afterwards were submitted on briefs to all the justices.

C. A. Snow, (*W. P. Everts* with him,) for the petitioners.

R. S. Hoar, Assistant Attorney General, for the Commonwealth.

BOOTT MILLS vs. BOSTON AND MAINE RAILROAD.

Middlesex. March 2, 1914. — October 22, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, SHELDON,
DE COURCY, & CROSBY, JJ.*Negligence, Employer's liability, Causing death. Joint Tortfeasors.*

The damages recoverable from an employer under the provisions of the employers' liability act contained in St. 1909, c. 514, §§ 128-131, for causing the death of an employee are punitive and not compensatory in character, being required to "be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable," and consequently an employer, who has incurred the punishment of paying the amount of a judgment against him for causing the death of an employee, cannot recover the whole or any part of the damages thus paid by him from another person who contributed to the wrongful conduct on which the judgment was founded; because the amount which the employer paid was the proportion assessable to his own wrong and nothing more.

In the present case the principle stated above was applied to an action by a mill corporation against a railroad corporation to recover the amount of a judgment paid by the plaintiff for causing the death of an employee by reason of a defect in a coal car that had been delivered to the plaintiff by the defendant in a defective condition.

The exception, to the rule that there can be no contribution between joint tortfeasors, which permits a recovery where the plaintiff acted in good faith and did not participate in the defendant's wrongful conduct, does not apply to an action by a mill corporation against a railroad corporation to recover the amount awarded for conscious suffering in a judgment paid by the plaintiff in an action against him under St. 1909, c. 514, § 128, for alleged negligence that caused conscious suffering of an employee preceding his death, in which damages were awarded for the death as well as for the conscious suffering; because under the statute there could have been no recovery against the plaintiff of substantial damages for the death unless there had been some degree of direct culpability on his part.

RUGG, C. J. This is an action in tort or contract which comes before us on report from a judge of the Superior Court,* who overruled the defendant's demurrer to the plaintiff's declaration.

The first count in the declaration alleges in substance that the defendant, a railroad corporation, negligently delivered a loaded coal car owned by it to the plaintiff, a cotton manufacturer,

* Fessenden, J.

knowing that the plaintiff in the ordinary course of its business would move the car by horses on tracks upon its premises, there unload and return it to the defendant; that the car was in a defective condition, whereby, while the plaintiff was causing the car to be moved with due care, one of its employees was injured, whose administrator recovered and collected a judgment against it for his conscious suffering, due notice of that action having been given to the defendant. The third count, which is in contract, sets forth the same facts with an averment that the defendant impliedly represented and agreed that the car was safe to be moved and unloaded in the manner undertaken by the plaintiff.

Counts 2 and 4 of the declaration aver in substance that by reason of the same negligent conduct of the defendant the plaintiff has been compelled to pay a judgment recovered against it by the administrator of its employee for his death by virtue of St. 1909, c. 514, §§ 128-131.

1. Counts 2 and 4 are dealt with first. They relate to recovery for death under the employers' liability act. According to its provisions, when an injury due to the tortious conduct of the employer or those for whom he is responsible results in the death of an employee, damages in a sum not less than \$500 nor more than \$5,000 to "be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable" may be recovered against the employer. So far as damages are recovered for death under this statute, they are to be paid to the widow, if there is one; if there is none, to the employee's next of kin.

The action between the administrator of the deceased employee and the plaintiff was before this court in *D'Almeida v. Boott Mills*, 209 Mass. 81. It there appears that the administrator brought two actions, one against the plaintiff, in part to recover for the death of his intestate under St. 1909, c. 514, §§ 128-131, wherein damages for \$3,300 were awarded, and another action against the present defendant under St. 1906, c. 463, Part 1, § 63, as amended by St. 1907, c. 392, wherein damages for \$6,300 were recovered. The latter statute permits recovery for the death of any person not an employee caused by the negligence of a railroad or street railway corporation, or the unfitness or negligence of its servants engaged in its business, to an amount not less than \$500 nor more

than \$10,000, also to "be assessed with reference to the degree of culpability of the corporation or its servants or agents."

The nature of the liability imposed upon the plaintiff by the judgment recovered against it for \$3,300, based upon its negligence in causing the death of its employee, must be considered.

With the exception of the workmen's compensation act, St. 1911, c. 751, which has no bearing upon the questions here presented and which is to be considered as excluded from this discussion, the remedy provided by our statutes imposing liability for negligently causing the death of a human being uniformly, from the earliest instance, has been punitive in nature. Either by necessary implication or express terms in all such statutes the amount to be recovered has been proportioned to the degree of blame of the wrongdoer. None of these statutes has made the amount of damages recoverable compensatory in their character. Damages have not been and could not be assessed under the statutes with reference to the injuries suffered by the persons to whom they are paid, but solely with reference to the degree of culpability of the guilty party in causing the death. The greater the fault the greater has been the sum recovered. That appears from the detailed examination of our statutes in *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510. The point was decided expressly in that case, with ample reference to all the statutes and a comparison with the English death statute known as Lord Campbell's act and others following it in many States of the Union, and a review of all our cases. That was an inevitable conclusion from the tenor of our statutes and of our earlier decisions. Under this form of statute manifest advantages accrue to the widow and next of kin of the person whose life is lost over those afforded by statutes of which Lord Campbell's act is the type. The wrongdoer is punished according to his guilt, and that which is in substance a fine proportioned to that guilt is paid to the person or persons, or some of them, who have suffered by reason of the death and thus to whom the injury has been done. The conduct of the deceased, in case he is a passenger upon any common carrier, whether negligent or otherwise, has nothing to do with the matter. Under all the statutes the deceased has no control over such an action, even though he survives the injury for a considerable time in the full possession of his

faculties. The cause of action does not arise until his death. *Bowes v. Boston*, 155 Mass. 344, 349. *Merrill v. Eastern Railroad*, 139 Mass. 252, 257. *Church v. Boylston & Woodbury Cafe Co. ante*, 231.

A reference to a few other of our cases makes plain the point. It was said in *Carey v. Berkshire Railroad*, 1 Cush. 475, 480, respecting the railroad statute, that the penalty "is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased." This language has been quoted or referred to with approval, or the principle followed, in many subsequent cases: *Commonwealth v. Boston & Lowell Railroad*, 134 Mass. 211, 213; *Commonwealth v. Eastern Railroad*, 5 Gray, 473; *Kelley v. Boston & Maine Railroad*, 135 Mass. 448; *Littlejohn v. Fitchburg Railroad*, 148 Mass. 478; *Commonwealth v. Boston & Albany Railroad*, 121 Mass. 36; *Merrill v. Eastern Railroad*, 139 Mass. 252; *Cripps's Case*, 216 Mass. 586, 588, 589; *Wiemert v. Boston Elevated Railway*, 216 Mass. 598, 602. In *Doyle v. Fitchburg Railroad*, 162 Mass. 66, 71, it was said respecting a kindred statute where substantially the same language was used, that the remedy "is in substance a penalty;" and in *Littlejohn v. Fitchburg Railroad*, 148 Mass. 478, 482, that it was "penal in its character;" in *Jones v. Boston & Northern Street Railway*, 205 Mass. 108, 109, as being "of a penal nature;" in *Renaud v. New York, New Haven, & Hartford Railroad*, 210 Mass. 553, 557, it was referred to as "a penal statute to punish the railroad for causing through negligence the death of a passenger." In *Brown v. Thayer*, 212 Mass. 392, 399, it was said, "The statute may be designated as remedial for the reason that a remedy is provided where before its enactment none existed. But the damages assessed are distinctly grounded upon the defendant's culpable misconduct and are diminished or enhanced according to the degree of his delinquency."

The conclusion that the death statutes are punitive and not compensatory in nature is founded in large part upon the words now employed in all such statutes, that the amount of damages which may be recovered are to "be assessed with reference to the degree of culpability of the" person liable. See as to death occa-

sioned by defective highways, R. L. c. 51, § 17; by negligence of common carriers other than railroads and street railways, R. L. c. 70, § 6; by negligence of railroads and street railways, St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392, and by St. 1912, c. 354; by negligence of others not employers, R. L. c. 171, § 2, as amended by St. 1907, c. 375 (hereinafter referred to as the general death statute); and by employers, St. 1909, c. 514, §§ 128-131. The damages awarded by the first three of these statutes were recoverable only by indictment previous to St. 1881, c. 199 (except as to street railways, which was changed by St. 1886, c. 140). These two statutes last cited gave an option to proceed by an action of tort as well as by an indictment in cases against railroads and street railways, *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510, 515, but abolished the remedy by indictment as to death caused by other common carriers and through defective highways. The damages awarded by the last two of these statutes, namely, for death occasioned by an employer (see St. 1887, c. 270, § 3) and by all others not otherwise made liable (see Sts. 1897, c. 416; 1898, c. 565), never have been recoverable by indictment. But these statutes always have required the amount recoverable to be assessed "with reference to the degree of culpability" of the person liable, or his servants or agents, which are the same words used in all the other death statutes. These are the decisive words. They stamp the character of the damages awarded as punitive rather than compensatory. The use of these words puts all these statutes in the same class and renders them harmonious and consistent. Remedy by civil action at present is given by all the death statutes and is almost always, if not universally, resorted to; while the concurrent relief by indictment now survives only as to railroads and street railways. It would be an awkward and incoherent conclusion to say that the damages recoverable by action under the death statutes as to highways, railroads, street railways and other common carriers are not compensatory, but are punitive (as has been decided expressly many times), and to say that the death statute as to employers and all persons not otherwise expressly provided for are compensatory and are not punitive, when the important words of all the statutes are identical. The cause of action in all the statutes is the same, namely, the death of a human being caused

by negligence. The amount of damages recoverable under all the statutes is to be assessed in exactly the same way. The sum recovered under all the statutes is paid, not for the benefit of the estate of the deceased, but to some of his family. That the general death statute, R. L. c. 171, § 2, as amended by St. 1907, c. 375, is a punitive statute seems to be settled by *Brown v. Thayer*, 212 Mass. 392, where it was said that that "statute . . . recognizes the punitive nature of the civil remedy by requiring the assessment of damages to be 'with reference to the degree of . . . culpability.'"

The death section of the employers' liability act has been adverted to by the court in several cases. As a ground of decision in *Mulhall v. Fallon*, 176 Mass. 266, at page 269, it was said by Chief Justice Holmes, "Whether the action is to be brought by them [the widow or next of kin] or by the administrator, the sum to be recovered is to be assessed with reference to the degree of culpability of the employer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this State." In *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510, at page 514, occur these words: "The system of imposing a punishment for wrongfully causing death in place of giving to the family of the deceased an action for compensation has been adhered to and extended since the decision in *Carey v. Berkshire Railroad*, when it applied only to travellers on defective highways and to passengers of common carriers. . . . It will be plain, from what is said hereafter, that the employers' liability act, in what is now R. L. c. 106, § 73, which was taken from the English act following Lord Campbell's act, is so far modified by § 74, in spite of what is now § 72, as to be a part of this system." In *Cripps's Case*, 216 Mass. 586, at page 589, it was stated, with reference to the death sections of the employers' liability act now under discussion, "But the amount recovered has been held to be in substance a penalty." These decisions show that from the first the employers' liability act has been recognized as belonging to the class of penalty statutes as much as St. 1906, c. 463, Part I, § 63, as to deaths caused by railroads and street railways, where the remedy by indictment given at first always has been retained. They rest on the solid foundation that where damages are not compensatory, but are assessed wholly with reference to the

degree of the culpability of the wrongdoer, they are imposed as a punishment. Under these circumstances, it must be held that the statutes are the same in the general characteristic of being punitive rather than compensatory.

The ground upon which liability may be established varies under the different statutes and has varied from time to time under the same statute. Where the life of a passenger upon a railroad, street railway or other common carrier is lost through the latter's negligence, the plaintiff need not show that the deceased was in the exercise of due care. Where death occurs at a grade crossing through collision with the engine or cars of a railroad company, and the required statutory signals have not been given, recovery may be had, unless it is shown affirmatively that the gross or wilful negligence of the deceased or his violation of law contributed to the death. *Brooks v. Fitchburg & Leominster Street Railway*, 200 Mass. 8, 14, 16. In an action to recover for death occasioned to others than passengers by a railroad or a street railway, the burden of showing that the deceased actively and actually exercised due care has been held to rest on the plaintiff. *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510, 521. The other death statutes, except R. L. c. 51, § 17, expressly require that the person killed should have been in the exercise of due care. In several of the statutes recovery was predicated up to 1907 on the gross negligence of the servants or agents of the corporation causing the death, although since that year proof of negligence alone has been enough. The amount which may be recovered and the persons to whom or for whose benefit it is payable varies under the different statutes. Formerly indictment alone was available under three of the statutes. Indictment as a means of punishment is not available to the individual as matter of right, but is dependent upon the action of the grand jury, and the rules of the criminal law prevail as to degree of proof and other matters of procedure. *Kelley v. Boston & Maine Railroad*, 135 Mass. 448. If an action of tort be brought, then in these respects the proceedings are governed by the rules applicable to civil causes. *Grella v. Lewis Wharf Co.* 211 Mass. 54, 58. At present, as has been pointed out, indictment survives only as an alternative remedy in two of the death statutes. But in all these different instances, whatever may be the procedure, and whatever may be the elements required to

establish a case on the part of the plaintiff, and however heavy or light may be the burden of proof resting upon him, when once his case is established, the amount of damages to be recovered, which is another way of describing the punishment to be meted out to the defendant, must be ascertained in the same uniform way. It always is determined with reference to the degree of his culpability. In effect it is a punishment by the imposition of that which in substance is a fine and not the payment of a simple civil obligation. Under statutes where the relief afforded was by indictment alone, it is easy to see that the money received by the family of the deceased was a gratuity from the government derived from the fine imposed upon the one negligently causing the death. In this Commonwealth there is no such thing known to the common law as the recovery of punitive damages in addition to compensatory damages. *Ellis v. Brockton Publishing Co.* 198 Mass. 538. It is only by express statute that such damages may be awarded. But, although the employers' liability act is unusual in combining in one statute and by one action the recovery of damages for conscious suffering which are compensatory, and damages for death which is to be assessed with reference to the degree of culpability of the wrongdoer, and in making the establishment of the plaintiff's case upon each branch dependent upon ordinary liability of the employer as fixed by the act, yet there is no difficulty in separating these two elements and holding the one to be compensatory and the other to be punitive. In an action for death under the employers' liability act, the degree and elements of proof resting upon the plaintiff are those fixed by that statute, but the amount to be paid by the defendant is found by the application of the rule phrased in words identical to all death statutes. When the Legislature has used these same words in so many different statutes, the conclusion hardly can be escaped that it used them with the same purpose and intent and as expressive of the same policy. This conclusion gains added force in view of the numerous decisions to which reference has been made, where the court had interpreted those words and defined their scope and meaning.

Therefore, it is of little, if any, consequence that the word "compensation" happens to have been used in the original enactment of the employers' liability act, St. 1887, c. 270, § 3. The

word "damages" was substituted for it in R. L. c. 106, § 74, and subsequent re-enactments. The decisive words which determine the character of the relief afforded as being punitive and in harmony with all other statutes upon the subject are those which require the amount for which recovery may be had to "be assessed with reference to the degree of culpability of the employer."

This conclusion is re-enforced by the consideration that the maximum amount of damages recoverable under St. 1909, c. 514, §§ 128-131 (under which the plaintiff has been found liable to the original plaintiff) is only \$5,000, payable to the widow of the deceased or, if there is no widow, to his dependent next of kin; while under St. 1906, c. 463, Part I, § 63, as amended by St. 1907, c. 392 (under which the defendant was found liable to the original plaintiff) the maximum amount of damages recoverable is \$10,000, to be paid "one half thereof to the use of the widow and one half to the use of the children of the deceased; or, if there are no children, the whole to the use of the widow; or, if there is no widow, the whole to the use of the next of kin." The Legislature thus has imposed a different measure of damages upon the two classes of defendants and has provided for the distribution of the amount recovered amongst different persons.

Appropriate instructions in the action of D'Almeida against the present plaintiff would have been in substance to the effect that the wrongful conduct of the Boott Mills was the limit of its responsibility, and that if the course of business between it and the railroad company had been such that the Boott Mills as a reasonable person had a right to rely wholly upon the railroad's care and inspection of the car and to receive and use it in the limited way in which it did without any inspection on its own part, and if such conduct was justified by the knowledge which the railroad had of the method of the Boott Mills in doing its business, and if the inspection and care which the railroad ought to make of its car before delivering it to the mills, was such as warranted the mills in relying implicitly upon that care and inspection, then the Boott Mills might have been found guilty of no culpability.

The sole foundation of a verdict of \$3,300 against the Boott Mills is that the jury found that sum to be the measure of the degree of culpability of the Boott Mills. The meaning of culpa-

bility as used in these statutes has been substantially settled in the cases heretofore cited and especially in *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510. If the Boott Mills without fault on its part had been exposed to legal liability through the negligence of the railroad, no verdict for \$3,300 against it could have been recovered. The liability of the mill corporation to the administrator of its employee depended upon the rules established in the employers' liability act. But the amount of damages depended solely upon the degree of culpability or guilt on the part of the mill corporation. If the Boott Mills without moral delinquency upon its own part had been exposed to this liability through the negligence of the railroad, no such verdict could have been recovered.

If, in the case at bar, the defendant gave to the plaintiff originally only the slightest reason to suppose that no inspection was needed on the part of the latter, then the fault of the latter would be very much greater than if the railroad company had given the mill company every reason to believe that no inspection was necessary. The result would be that the more careful the railroad company was to warn the mill corporation the greater would be the sum it would have to pay (if an action like the one at bar can be maintained), because the greater would be the culpability of the mill corporation. In other words, the liability of the railroad to the mill corporation would be in an inverse ratio to the care the railroad corporation showed to the mill corporation.

It is an unavoidable consequence of the proposition that the damages recovered for death under St. 1909, c. 514, §§ 128-131, are punitive and not compensatory in character that the employer, who has been punished by paying the amount of a verdict against him, cannot recover over from one who has contributed to the wrongful conduct on which that verdict was founded. The employer has been required to pay simply damages proportioned to his own wrong and nothing more. Plainly he has not been compelled to pay for the wrongful conduct of any one else for which he is in no way blameworthy. It would be almost a contradiction in terms to say that one could recover over from another a penalty to which he has been subjected for his own wrongdoing. It would be directly contrary to the theory on which recovery over is allowed in the cases discussed in the final branch of this

opinion. The idea of a penalty or punishment excludes liability on the part of anybody except the wrongdoer.

There is nothing contrary to this result in *D'Almeida v. Boott Mills* and *D'Almeida v. Boston & Maine Railroad*, 209 Mass. 81. In both those actions the plaintiff prevailed, having recovered substantial verdicts in the Superior Court, and the cases were brought here solely on the exceptions of each defendant. One of the requests for rulings presented by the Boston and Maine Railroad was, "The Boott Mills and the Boston and Maine Railroad cannot be held liable on the evidence as joint tortfeasors." Exception was taken by the Boston and Maine Railroad to the denial of that request and to "that part of the charge in which the jury were instructed that they could find against both defendants." Plainly the plaintiff could have maintained his action against each of the defendants in those cases. In the sense that the Boott Mills and the Boston and Maine Railroad each contributed to a wrong to the plaintiff, it might be that such participation constituted a joint tort. But the question did not arise in those cases whether a joint action could have been maintained for the recovery of the penalty to which each defendant was liable for participating in the wrong which caused the death. That question arose in *Brown v. Thayer*, 212 Mass. 392, where it was held that under such circumstances and by reason of the statutes no joint action could be maintained. No question arose in *D'Almeida v. Boott Mills* and *D'Almeida v. Boston & Maine Railroad* as to satisfying judgments against both defendants for the death. It was not necessary to discuss the point here raised because it was not then before the court. Indeed, the reference to "one satisfaction in damages," which occurs in that opinion, was an *obiter dictum* because that point was not before the court. Whether it was correct is not now before the court. If it is inconsistent with the reasoning of the present opinion, to that extent it is not followed.

It is not necessary to decide whether this kind of action is penal in the international sense, as are cases where the Commonwealth alone institutes and prosecutes an action and receives the benefit of the fine. See *Huntington v. Attrill*, 146 U. S. 657; *Boston & Maine Railroad v. Hurd*, 108 Fed. Rep. 116; *Cristilly v. Warner*, 87 Conn. 461, 466. That point is left open.

The general principle of law is too well settled to require an

extensive citation of authorities, that one of several wrongdoers cannot recover either proportionally or wholly from another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. *Union Stock Yards Co. v. Chicago, Burlington & Quincy Railroad*, 196 U. S. 217, 224. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 217. *Old Colony Street Railway v. Brockton & Plymouth Street Railway*, ante, 84.

The exception to this rule established by *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24, *Gray v. Boston Gas Light Co.* 114 Mass. 149, and *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, permits recovery over where the tortfeasor seeking contribution from another tortfeasor as between the two is free from moral delinquency, and where damages have been assessed with reference to the injuries done to the original plaintiff by the wrong to which all the joint wrongdoers have contributed. That is a plain and simple exception to a general rule. It is easily understood and applied. To extend the exception to cases where the greater the culpability of the delinquent seeking contribution, the greater is the sum the codeelinquent shall be compelled to pay, and where the degree of culpability of the former may be in inverse ratio to the culpability of the latter, would go far toward breaking down the rule and finds no justification in any sound principle of law and would lead to many cases of manifest injustice.

2. The plaintiff also seeks to recover under its counts 1 and 3 for the damages paid to the administrator of its employee for conscious suffering, which were assessed by the jury in the sum of \$200. It is alleged in its declaration that the actions mentioned in each of the four counts was the same, and a copy of the plaintiff's declaration in the original action against the present plaintiff is annexed to the present declaration. It contains three counts; the first two being under the employers' liability act for "death and conscious suffering, and the third at common law for conscious suffering only." It is alleged in the declaration in the present action that "The verdict of the jury rendered therein was as follows: 'December 21, 1910. Verdict for plaintiff for \$3,500, of which amount \$3,300 is for death and \$200 is for conscious suffering.'" The demurrer sets up the point that recovery by

the original plaintiff against the present plaintiff, being under a penal statute, there can be no recovery over.

The plaintiff relies upon the well recognized exception to the general rule that there can be no contribution between joint tortfeasors, to the effect that a plaintiff may recover over against other joint tortfeasors, where, although he has been negligent as to third persons in failing to perform a duty cast on him by law, he nevertheless has acted in good faith and has not participated in any wrongful conduct, has shown all the caution which the defendant had a right to expect of him, and has relied upon the defendant to perform his active legal duty of due care, whose decisive and definite act of failure in this respect has exposed the plaintiff to liability to a third person arising from inference of law, without moral guilt on the plaintiff's part and without his sharing in the wrongful cause of the injury. It relies upon this branch of the case on *Jacobs v. Pollard*, 10 Cush. 287, 289, *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24, 32, *Gray v. Boston Gas Light Co.* 114 Mass. 149, *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232. It is manifest, however, from the allegations of the plaintiff's declaration, that this principle cannot apply, because judgment has been recovered against it for causing the death of its employee, which could only have been assessed in the substantial amount alleged by reason of some degree of direct culpability on its part. For the reasons pointed out in the earlier part of this opinion, such a verdict for that cause could not have been recovered against the plaintiff if, as between it and the present defendant, it was free from any wrongdoing. It follows that the principle which the plaintiff invokes as the ground of its right to recover has no application to the facts disclosed by its declaration.

In the opinion of a majority of the court the entry under the terms of the report must be

Judgment for the defendant.

The case was argued at the bar in March, 1914, before *Rugg, C. J., Loring, Braley, Sheldon, & Crosby, JJ.*, and afterwards was submitted on briefs to all the justices.

F. N. Wier, (J. M. O'Donoghue with him,) for the defendant.

F. E. Dunbar, (A. C. Spalding with him,) for the plaintiff.

EDWARD McCANN vs. CENTRAL CONSTRUCTION COMPANY.

Suffolk. May 19, 1914. — October 22, 1914.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, SHELDON, DE COURCY,
& CROSBY, JJ.*Negligence, In dragging heavy stone.*

A contractor's foreman, who orders a teamster of twenty-five years' experience, whom he has hired with his team from a master teamster, to unhitch from the wagon the pair of horses he has brought with him and hitch them to a lead bar for the purpose of dragging a flagstone six feet long by three feet wide to a place about forty feet distant, owes no duty to the teamster to tell him that, if he has only ordinary reins, he should walk alongside the horses in a place of safety instead of walking between the horses and the stone where he may be hit by the stone as it is being jolted over rough ground.

DE COURCY, J. The defendant corporation was engaged in repaving and repairing Hancock Street in the part of Boston called Dorchester, and procured some teams and drivers from one Edward Burns, a teaming contractor, to use in connection with its work. Burns had sent his employee, the plaintiff, with a pair of horses, to report to the defendant's foreman, one Condry. After taking a load of macadam or gravel to the dump, the plaintiff was directed by Condry to take the horses from the wagon, hitch them to a lead bar and drag a flagstone, that was about six feet long and three feet wide, from its position on the crosswalk to a place about forty feet distant.

This lead bar was a piece of timber four or five feet long, with a whiffletree at each end, to which a horse was hitched. On the other side of the bar, and attached to its ends, was a chain which extended toward the stone to be dragged; the bar and chain forming a triangle, at the apex of which was a ring. Another chain was fastened around the stone and hooked to the ring. The plaintiff walked between the horses and the stone while driving, and had gone but a short distance when the stone struck his foot and injured him.

The defendant asked the judge * to rule that upon all the evidence and pleadings the plaintiff was not entitled to recover. This ruling should have been given. The declaration alleged only that through the negligence of the defendant "said stone became detached from its chain and rolled over on to the plaintiff's foot." There was no evidence to support this allegation, or to show that the chain was defective or was imperfectly fastened to the stone; and no motion to amend the declaration was made.

It is now argued that the defendant's foreman, Condry, was negligent in ordering the plaintiff to do this work without extension reins. Even assuming that this contention is open to the plaintiff, in our opinion it cannot prevail. The plaintiff was a teamster with an experience of more than twenty-five years, and was familiar with this kind of work. Condry had no reason to assume that he needed any instruction in carrying out the order to move the stone, even though he used ordinary reins. It is perfectly apparent from the evidence that he might have walked alongside the horses in a place of safety; and Condry well might assume that he would do so instead of walking directly in front of a stone that was being jolted over the rough ground. *White v. Wells Brothers Co. of New York*, 214 Mass. 444. And it is to be noted that if the plaintiff had wanted extension reins he should have brought them with him, as his employer Burns, and not the defendant, was the one who would furnish them.

As there was no evidence of negligence on the part of the defendant, it is unnecessary to consider the questions of the plaintiff's due care and assumption of risk. Under the provisions of St. 1909, c. 236, § 1, the entry must be

Judgment for the defendant.

The case was submitted on briefs at the sitting of the court in May, 1914, and afterwards was submitted on briefs to all the justices.

E. I. Taylor & J. W. Britton, for the defendant.

D. H. Coakley & J. G. Walsh, for the plaintiff.

* *Hall, J.* The jury returned a verdict for the plaintiff in the sum of \$775; and the defendant alleged exceptions.

RICHARD F. DOOLEY vs. WILLIAM SULLIVAN & another.

Berkshire. September 8, 1914. — October 22, 1914.

Present: RUGG, C. J., LORING, SHELDON, DE COURCY, & CROSBY, JJ.

Negligence, Employer's liability. Workmen's Compensation Act.

In an action at common law by a workman against his employer for personal injuries, alleged to have been caused by the failure of the defendant to give the plaintiff notice of the dangers incident to his employment, which happened after St. 1911, c. 751, Part I, § 1, took effect, so that neither contributory negligence of the plaintiff, the negligence of a fellow employee nor the plaintiff's assumption of the risk of injury is open as a defense, the only question to be tried is whether the defendant was negligent in failing to warn the plaintiff.

In an action at common law by a workman against his employer for personal injuries sustained, while engaged in assisting in the work of tearing down the walls of a brick building that had been destroyed partially by fire, by reason of the alleged negligence of the defendant in failing to warn the plaintiff of the danger to which he was exposed, there was evidence that the plaintiff had had considerable experience in working in the removal and demolition of buildings, that a wall of the building had had a hole knocked in it across which a plank was placed with a chain attached to it by ropes and pulleys, connected with a capstan turned by a horse, for the purpose of producing such a strain on the wall as to cause it to fall into the cellar, that the plank used for this purpose had broken, that a foreman, who could be found to have been directing the work by authority of the defendant, ordered the plaintiff "to change the hitch" on the rope that was attached to the chain that went around the plank, that the plaintiff, in obeying this order, was obliged to walk over a surface strewn with bricks, pipes, timbers, electric wires and other rubbish, that he walked in the direction of the wall, keeping seven or eight feet away from it, and then, turning his back to the wall, proceeded to carry out the order by pulling on the block that was fastened to the chain, when the wall suddenly fell upon him without warning. There also was evidence that the defendant's foreman was standing about twenty feet away from and in sight of the wall when it fell upon the plaintiff, that after the plank had broken the wall had swayed and mortar had fallen from it, and that on other occasions, previous to the accident, the foreman had warned the plaintiff and the other workmen of the dangers that arose during the progress of the work. *Held*, that it could be found by the jury that the defendant's foreman had better means than the plaintiff of observation and of seasonably appreciating the danger and that he should have warned the plaintiff before it was too late.

CROSBY, J. The plaintiff seeks to recover for personal injuries sustained by him on July 22, 1912, while assisting in the work of tearing down the brick walls of a building, owned by the defendants, which had been partially destroyed by fire. The plaintiff's

declaration contained eight counts; the case was submitted to the jury * upon the first and second counts only, both of which were at common law. The first count alleges that the defendants failed to give the plaintiff instruction and notice of the dangers incident to his employment. The second count alleges that the defendants so negligently managed the work of tearing down the wall that it was caused to fall upon the plaintiff. The provisions of the workmen's compensation act, so called (St. 1911, c. 751), apply to this case so far as applicable to these counts at common law, as the act was in force at the date of the plaintiff's injuries and the defendants were not subscribers under the terms of the statute. It follows that neither contributory negligence, the negligence of a fellow employee, nor the plaintiff's assumption of the risk of injury, is open to the defendants as a defense to the action. St. 1911, c. 751, Part I, § 1.

Accordingly under the common law counts the sole question presented is: Were the defendants negligent in failing to warn the plaintiff? The answer to this question depends upon the conduct of one Witt. If, as the jury could have found, he was directing the work by authority from the defendants when the plaintiff was hurt, any negligence on his part while carrying out the defendants' orders is to be imputed to them. If they saw fit to delegate to him the control of the work and the manner of its performance, their liability is not different from what it would have been if they had been personally in charge when the accident occurred. *Grace v. United Society called Shakers*, 203 Mass. 355, 357.

While it was contended by the defendants at the trial that the plaintiff was not in their employ and that the work of taking down the walls was being performed by Witt as an independent contractor, yet the jury found to the contrary. The presiding judge submitted the following question to the jury: "Was the plaintiff at the time of the accident employed by the defendants or either of them, in the work where he suffered injury?" To which question the jury answered, "Yes." This question was properly submitted to the jury upon the evidence, and conclusively establishes the fact that the plaintiff was in the defendants' employ when he was injured. This was an important issue of fact at the trial.

* By Hardy, J.

The case is submitted to this court upon briefs; and the only question argued upon the brief of the defendants is that the first ruling requested by them, namely, "That upon the evidence the plaintiff is not entitled to recover on the first count of his declaration," should have been given; it being the contention of the defendants that the evidence was not sufficient to warrant a verdict for the plaintiff upon the first count, and that, as a general verdict for the plaintiff was returned upon both counts, the exceptions should be sustained.

The evidence shows that the plaintiff, previous to the accident, had had considerable experience in moving and demolishing buildings and in other similar labor, and that he knew in a general way of the dangers connected with the work in which he was engaged at the time of the accident.

The duty of an employer to warn exists when there are dangers arising in the course of the employment which he knows or ought to know, and which he has reason to believe the employee does not know and will not discover in time to protect himself from being injured because of them. *Stuart v. West End Street Railway*, 163 Mass. 391. *Ciriack v. Merchants' Woolen Co.* 146 Mass. 182.

One of the methods adopted in demolishing the walls of this building was by making a hole in the wall and then laying across the opening a plank to which a chain was attached by ropes and pulleys and connected with a capstan, the latter being turned by a horse, thereby producing such a strain upon the wall as to cause it to fall into the cellar. There was evidence to show that just before the accident one of these planks, because of the strain upon it, had broken, and the plaintiff was ordered by Witt "to change the hitch;" that the plaintiff, for the purpose of complying with Witt's order, walked in the direction of the wall (which was from twenty to twenty-five feet high) but keeping seven or eight feet away from it, and engaged in the work he had been ordered to do. He had turned his back to the wall and was pulling back on the block that was fastened to the chain that was around the plank, when the wall fell upon him without warning. It was competent for the jury to find from the testimony that in the cellar over which the plaintiff was obliged to pass were bricks, pipes, timbers, electric wires and other rubbish, which made it

difficult for him to walk in safety; that the danger of the wall falling was not obvious from the place where the plaintiff was directed to make the hitch; that the plaintiff's attention was necessarily chiefly devoted to finding a safe footing in passing to the place where it was necessary for him to go in order to make the hitch, and that he did not know of the danger until it was too late to save himself; and that the defendants' foreman and agent, Witt, had better means of observation and of seasonably appreciating the danger, and should have warned the plaintiff before it was too late.

The question for the jury was not only what each knew, but what each ought reasonably to have known concerning the risk. As was said by this court in *Haley v. Case*, 142 Mass. 316, 323: "When the master undertakes to direct specifically the performance of work in a particular manner, we cannot say, as matter of law, that the servant is not justified in relying to some extent upon the knowledge and carefulness of his employer, and in relaxing somewhat the vigilance which otherwise would be incumbent upon him. The servant's attention must be principally directed to the performance of the work in the manner in which he is ordered to perform it, and he may be in a less favorable position to see and judge of the surrounding dangers; and, when he is suddenly called upon to perform a piece of work in a particular manner, under the eye of his employer, he may not reasonably have time for the most careful observation." Witt could have been found by the jury to have been in charge of the work of tearing down the walls as the defendants' foreman, and there was evidence to show that he was standing about twenty feet away from and in sight of the wall when it fell upon the plaintiff; that after the plank broke the wall swayed and mortar fell from it; and shortly afterwards the wall came down. In view of this evidence it was for the jury to say whether the plaintiff needed warning, and also whether Witt was negligent in failing to give such warning. Besides it further could have been found that on other occasions before the accident Witt had warned the plaintiff and the other workmen of the dangers which arose during the progress of the work. Under these circumstances as disclosed by the evidence it could not have been ruled as matter of law that the plaintiff could not recover upon the first count. *Proulx v. J. W. Bishop Co.* 204 Mass. 130.

It was for the jury to determine upon the evidence and the reasonable inferences to be drawn therefrom, whether the dangers connected with the work were so obvious that, considering his age, experience and intelligence and the danger to which he was exposed, the plaintiff needed instructions or warning. So too it was a question of fact for the jury whether the defendants' foreman Witt, acting as a reasonably prudent man, knew or ought to have known that the plaintiff was ignorant of the danger and could not have discovered it by the exercise of reasonable care, and therefore should have been warned by Witt that the wall might fall. *Lynch v. Allyn*, 160 Mass. 248. *Cote v. Lawrence Manuf. Co.* 178 Mass. 295. *Boucher v. New York, New Haven, & Hartford Railroad*, 196 Mass. 355. *Gettins v. Kelley*, 212 Mass. 171. In the cases relied on by the defendants the danger was as obvious to the plaintiff as to the defendant, and a warning would not have given to the plaintiff any information which he did not possess or which by ordinary observation he could not have obtained. For this reason such cases as *Stuart v. West End Street Railway*, 163 Mass. 391, *Sampson v. Holbrook*, 192 Mass. 421, *Boisvert v. Ward*, 199 Mass. 594, and *Goudie v. Foster*, 202 Mass. 226, are clearly distinguishable. The case of *Noonan v. Foley*, 217 Mass. 566, also relied on by the defendants, involved a passing risk of such a nature that the defendant could not reasonably have anticipated the injury to the plaintiff and have guarded against it. See *Rear-don v. Byrne*, 195 Mass. 146, 150, and cases cited.

As the only exception argued by the defendants is to the refusal of the court to direct a verdict for the defendants upon the first count, which, for the reasons stated, could not have been done, the others are to be treated as waived, although we perceive no error in the manner in which the case was dealt with by the presiding judge. Accordingly the order must be

Exceptions overruled.

The case was submitted on briefs.

M. E. Couch & W. H. Brooks, for the defendants.

C. J. Parkhurst, C. P. Niles & F. M. Myers, for the plaintiff.

COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS, DAVID L.
BURDO, claimant.

Worcester. September 28, 1914. — October 22, 1914.

Present: RUGG, C. J., BRALEY, SHELDON, DE COURCY, & CROSBY, JJ.

Intoxicating Liquors. Forfeiture, Of intoxicating liquors. Judgment. Practice, Criminal, Discontinuance. Evidence, Presumptions and burden of proof.

A criminal proceeding *in rem* under R. L. c. 100, § 48, for the forfeiture of certain intoxicating liquors alleged to have been brought into a town in which licenses of the first five classes were not granted and to have been intended for sale in violation of law, is not barred by the previous conviction under St. 1906, c. 421, as amended by St. 1910, c. 497, § 2, of the person who transported the liquors for transporting them in the town without having been granted a permit so to do.

A criminal proceeding *in rem* under R. L. c. 100, § 48, for the forfeiture of certain intoxicating liquors, is not barred by a previous proceeding under the same statute, in which the prosecuting officer terminated the case by a discontinuance and an order was made for the return of the liquors followed by their delivery to the claimant.

A criminal proceeding *in rem* is not affected by a previous complaint under the same statute relating to the same matter which was dismissed by a district court for want of jurisdiction.

In a proceeding *in rem* under R. L. c. 100, § 48, for the forfeiture of certain intoxicating liquors, the allegations of the complaint must be proved as in other criminal cases beyond a reasonable doubt.

COMPLAINT received and sworn to in the First District Court of Northern Worcester on May 3, 1913, under R. L. c. 100, § 48, charging that certain intoxicating liquors, therein named, on November 18, 1912, were illegally transported by one Moore in Athol, a town wherein licenses of the first five classes to sell intoxicating liquors were not granted, which liquors were intended for sale contrary to law, and praying that such liquors might be declared forfeited.

David L. Burdo appeared as claimant, alleging that the liquors were his property. The District Court made a decision, adjudging that Burdo had failed to sustain his claim, that the liquors were transported illegally by Moore for the purpose of being sold in violation of law, and ordering that the liquors and the vessels containing them should be delivered to the chief of the district

police, that they should be sold by him according to law and that the net proceeds should be paid into the treasury of the Commonwealth.

The claimant Burdo appealed; and in the Superior Court the case was tried before *Hall, J.*, upon an agreed statement of facts, which included a description of the proceedings previous to this complaint that are referred to in the opinion. On the agreed facts the claimant asked the judge to rule as a matter of law that the liquors and vessels when seized upon May 3, 1913, were seized illegally and should be returned to the claimant. The judge refused so to rule, and the jury found upon the agreed facts that the liquors and vessels were on November 18, 1912, owned by Burdo, the claimant, and that the liquors on that date were being transported in violation of law by Moore in the town of Athol; and thereupon the judge gave judgment that the liquors and vessels were forfeited to the Commonwealth. The claimant alleged exceptions.

The case was submitted on briefs.

T. L. Walsh, C. B. O'Toole & J. H. Walsh, Jr., for the claimant.

J. A. Stiles, District Attorney, & *E. T. Esty*, Assistant District Attorney, for the Commonwealth.

BRALEY, J. By R. L. c. 100, § 48, "No person shall bring any spirituous or intoxicating liquor into a city or town in which licenses of the first five classes are not granted, with intent to sell it himself or to have it sold by another, or having reasonable cause to believe that it is intended to be sold in violation of law; and any liquor which is transported contrary to the provisions of this section shall be forfeited to the Commonwealth. . . ." The St. of 1906, c. 421, as amended by St. of 1910, c. 497, § 2, does not purport to repeal this section. It provides for the prosecution and punishment of persons and corporations merely transporting for hire spirituous or intoxicating liquors within the limits of a city or town where licenses are not granted unless they have received a permit issued by the board of mayor and aldermen or the selectmen of towns and signed by the licensing board. No provision for forfeiture is found. The trial and conviction of Moore on the first complaint appearing in the record we assume from the allegations to have been under this statute. The complaint charges no violation of § 48. The only issues under the

agreed facts relating to the subsequent proceedings are, whether on November 18, 1912, the claimant owned the liquors in question with the vessels, and whether on that day they were being illegally transported by Moore within the town of Athol where licenses of the first five classes were not granted. The jury having answered each issue in the affirmative, the claimant contends, that the judgment of forfeiture thereupon ordered should be reversed. The claimant, however, having expressly admitted that the jury could find that the transportation was illegal, the order should stand unless the proceedings subsequent to the first complaint were unauthorized and void.

It is plain that the conviction of Moore for transporting liquors without a permit would not bar his prosecution for transporting liquors within the town which were intended for illegal sale, or for keeping the liquor himself with intent to sell. *Commonwealth v. McConnell*, 11 Gray, 204. *Commonwealth v. Cleary*, 105 Mass. 384. The second complaint accordingly alleged that the liquors, with the implements of sale and furniture "used and kept and provided to be used in the illegal keeping and selling of said liquors were, and still are, kept and deposited by" Moore in an auto truck driven by him with intent to sell the same in violation of law. A search warrant issued, the liquors were seized, and the claimant upon the usual order of notice appeared and claimed the property. But, if in the District Court a forfeiture was ordered, the appeal of the claimant vacated the judgment, and the discontinuance in the appellate court by the prosecuting officer terminated the case. *Commonwealth v. Tuck*, 20 Pick. 356, 365.

The third complaint, which followed, charging illegal transportation with the intent by Moore or of "some one" to sell the liquors contrary to law, having been dismissed by the District Court for want of jurisdiction, the claimant's rights to the property remained the same as if these complaints had not been instituted or the search warrants issued.

Nor was the order for a return on May 3, 1913, entered upon the discontinuance, an adjudication barring the prosecution of the fourth complaint made on the same day under § 48, upon which the judgment of forfeiture has been entered, or the issuance of the search warrant thereon, even if the officer had certified on the order for a return that he had delivered the liquors to the claimant.

The gravamen of the offense is bringing intoxicating liquors with intent that they shall be illegally sold into a town which has voted for no license. R. L. c. 100, § 10. It is this criminal act which works the forfeiture, and the necessary proceedings for condemnation relate only to the act itself and not to the time when a search warrant issues.

While the allegations of the complaint must be proved as in all criminal cases, it is a proceeding *in rem*. *Commonwealth v. Intoxicating Liquors*, 115 Mass. 142. *Commonwealth v. Intoxicating Liquors*, 105 Mass. 595. *Commonwealth v. Intoxicating Liquors*, 107 Mass. 386, 392. The verdict having been warranted, the order was in accordance with the statute, and the exceptions must be overruled.

So ordered.

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ACCORD AND SATISFACTION.

An instrument under seal, delivered to one of two joint tortfeasors in consideration of a sum of money paid by him to the person who suffered from the tort, whereby such person covenanted "to forever refrain from instituting, pressing or in any way aiding any claim, demand, action or causes of action for damages . . . for or on account or in any way growing out of" the tort, does not operate as a release of the injured person's cause of action against the other tortfeasor. *Johnson v. Von Scholley*, 454.

In an action for personal injuries against one of two joint tortfeasors, where there was in evidence an instrument which on its face was a covenant by the plaintiff not to sue the co-tortfeasor, it was held that further evidence offered by the defendant tending to show that negotiations which occurred between the plaintiff and the co-tortfeasor previous to the execution of the covenant were for the purpose of a settlement and discharge of the claim for damages alleged in the declaration should have been admitted, because the defendant, not being a party to the instrument in writing, had a right to show by oral evidence that it did not express the terms of the actual compromise. *Ibid.*

Transactions between the plaintiff in an action for conversion and a person, other than the defendant, who also might have been held liable for the conversion, which were held as a matter of law to constitute a loan to the plaintiff, and not a satisfaction of the claim or a transfer of title to the property from the plaintiff, and to afford no defense to the action. *Rosenberg v. National Dock & Storage Warehouse Co.* 518.

ACTIONABLE TORT.

It seems that, if a girl is so frightened by an explosion that she faints and falls unconscious to the floor, where she sustains some physical injury, she has a cause of action against a person who wrongfully caused the explosion. *Conley v. United Drug Co.* 238.

It seems that if a girl is at work in a shop and an explosion occurs so violent as to splinter and rip up the floor and throw bottles about the room and break them, and the girl thereupon faints and cannot remember that she was struck by anything or was thrown down, but on an examination made after the accident a physician finds bruises on her body which could have been caused by a fall or by being thrown violently against some object in

Actionable Tort (continued).

the room, the girl has a cause of action against a person whose wrongful act or negligence caused the explosion, although the principal injuries suffered by her were due to fright, there being evidence of accompanying physical injury. *Conley v. United Drug Co.* 238.

If a woman passenger on a train of the elevated railway is pushed from the platform of a car at a station and falls so that one of her legs is wedged between the step of the car and the station platform, and if the servants of the corporation operating the railway, after finding that the woman cannot be extricated from her plight by the use of reasonable force, drag her out by the use of unreasonable force so that her leg is injured greatly, although there were tools at hand which might have been used to release her leg by cutting away a part of the platform, this gives the injured passenger a right of action against the corporation, irrespective of the cause of her fall from the car. *O'Day v. Boston Elevated Railway*, 515.

ACTIONS, SURVIVAL OF.

See SURVIVAL OF ACTIONS OR SUITS.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERSE POSSESSION.

In a suit in equity by the town of Ipswich, against the Proprietors of Jeffries Neck Pasture and a certain grantee from that corporation, to set aside a deed against the authorization of which the plaintiff had not been permitted to vote as the holder of certain undrawn rights in the defendant corporation, it was held that the defendant corporation had not acquired by ouster or adverse possession any title to such undrawn rights against the plaintiff. *Ipswich v. Proprietors of Jeffries Neck Pasture*, 487.

AGENCY.*Existence of Relation.*

In an action for the alleged conversion of certain personal property of the plaintiff left by him in a vacant building belonging to the defendant which formerly had been occupied by the plaintiff as a tenant, where a material question was whether a certain police officer was acting as the agent of the defendant in preventing the plaintiff from removing his property from the building, it was held that there was no evidence warranting a finding that the police officer was the agent of the defendant, and that for this reason a certain conversation between the defendant and the police officer was not admissible in evidence. *Jean v. Cawley*, 271.

Scope of Authority or Employment.

In an action for personal injuries from being knocked down by an automobile of the defendant negligently driven by the defendant's chauffeur, where

there was evidence that the chauffeur, after the happening of the accident, had told the defendant "the whole story, just the way it was," as to his using, for the purpose of obliging a friend of his own, an indirect route to reach a destination appointed for him by the defendant, and that the defendant said that he had a right to do so, it was held that such evidence might be found to have been an admission by the defendant that, as between him and the chauffeur, the chauffeur was acting within the scope of his employment. *McKeever v. Ratcliffe*, 17.

Agent who received a payment from one to whom goods were conveyed under a conditional sale was held to be, under the contract, a "cannasser" and not a "collector." *Drake v. Metropolitan Manuf. Co.* 112.

In an action for the conscious suffering of one who was run over by an automobile of the defendant, driven by a chauffeur employed by him, who had been in the car to his own home for a noon dinner and was proceeding from his home to the residence of the defendant, it was held that there was no evidence that the chauffeur was acting within the scope of his employment by the defendant at the time of the accident, because the only reasonable inference from the evidence was that the chauffeur was to procure his own meals, and that the time required to do so was his and not the defendant's. *Hartnett v. Gryzmish*, 258.

In such action it was held that the mere facts, that the defendant owned the car and that it was being driven by a chauffeur who was hired by him, did not warrant a finding that at the time of the accident the chauffeur was acting within the scope of his employment by the defendant. *Ibid.*

In the same action, it was held under the circumstances to have been proper to exclude a question, asked at the trial of the chauffeur by the plaintiff, as to whether he was willing that the defendant should have known that he took out the car in order to go to his noon meal. *Ibid.*

Lack of authority of a real estate broker, who was employed to sell land on certain terms, to make a contract in writing on those terms in the principal's behalf which would bind the principal under the statute of frauds. *Record v. Littlefield*, 483.

Liability of Principal for Acts of Agent.

Whether a warehouseman, whose agent has authority to issue receipts on the delivery of goods to the warehouseman and who issues a receipt for goods which the warehouseman never received, may be made liable upon such instrument if the warehouseman was negligent in the way in which he allowed such agent to conduct his business in regard to the issuing of receipts, was mentioned as a question not passed upon in *Rosenberg v. National Dock & Storage Warehouse Co.* 518.

In an action against a corporation for unlawfully causing the arrest of the plaintiff in a civil action upon a false affidavit of the defendant's president that the plaintiff was about to leave the Commonwealth, it was held that on the facts the plaintiff was entitled to have the jury instructed that, if a certain report of the agent to the defendant's president that the plaintiff was about to leave the Commonwealth was false, the agent's knowledge of its falsity was imputable to the defendant, and that, if the defendant acted on advice of counsel in making the arrest, but had failed to disclose to its counsel the true conversation between the defendant's agent and the

Agency (continued).

plaintiff, its acting upon the advice of counsel was no defense. *Cotter v. Nathan & Hurst Co.* 315.

Liability for Injury to Agent.

See NEGLIGENCE, *Employer's Liability*; WORKMEN'S COMPENSATION ACT.

Agent's Commission.

Where, in an action to recover a commission for having procured an agreement of two persons to pay the defendant \$1,500,000 for a half interest in his shoe machinery business and at least \$1,000,000 for working capital, it appeared that, after the conclusion of such an agreement, the defendant made new requirements to which the two persons would not accede, the plaintiff is entitled to go to the jury on counts for a *quantum meruit* and on an account annexed. *Hutchinson v. Plant*, 148.

See also BROKER, *Commission*.

Ratification by Principal of Acts of Agent.

Evidence, at the trial of an action against a corporation for an assault and battery alleged to have been committed by an agent of the defendant who on its behalf had delivered certain goods to the plaintiff upon a contract of conditional sale and who had committed the assault and battery in an effort to repossess the goods, upon which, it was held, the jury were warranted in finding that the defendant had ratified the acts of the agent. *Drake v. Metropolitan Manuf. Co.* 112.

APPEAL.

See that subtitle under EQUITY PLEADING AND PRACTICE; LAND COURT; PRACTICE, CIVIL; PROBATE COURT; WORKMEN'S COMPENSATION ACT.

ARBITRAMENT AND AWARD.

Arbitration under the Workmen's Compensation Act, see WORKMEN'S COMPENSATION ACT, *Arbitration*.

ARREST.

See UNLAWFUL ARREST.

ASSAULT AND BATTERY.

Evidence, at the trial of an action against a corporation for an assault and battery alleged to have been committed by an agent of the defendant who on its behalf had delivered certain goods to the plaintiff upon a contract of conditional sale and who had committed the assault and battery in an effort to repossess the goods, upon which it was held, the jury were warranted in finding that the defendant had ratified the acts of the agent. *Drake v. Metropolitan Manuf. Co.* 112.

ASSESSMENT.

See that subtitle under TAX.

ASSIGNMENT.

A policy of life insurance is a non-negotiable chose in action, and, if by his own voluntary action the insured or one to whom the insured has assigned his rights so clothes a third person with the *indicia* of ownership as to justify others in regarding him either as the rightful owner or as having authority from that owner to transfer the policy, the owner or a rightful assignee is estopped to set up his title against a *bona fide* purchaser for value from such third person. *Herman v. Connecticut Mutual Life Ins. Co.* 181.

An assignment of a policy of life insurance by the insured is valid as between him and the assignee, although the policy is not delivered to the assignee and although a provision of the policy, that no assignment of it "shall be valid unless made in writing, and a duplicate or certified copy thereof be filed at the office of said company," is not complied with. *Ibid.*

One who received an assignment of a policy of life insurance from the insured without the policy itself, which by reason of fraud of an agent of the insured was not delivered to him, may maintain a suit in equity for possession of the policy against a person to whom it has been delivered by the agent without right and who secretes it so that it cannot be reached in an action at law. *Ibid.*

In a suit in equity by the first assignee of a policy of life insurance against a second assignee to gain possession of the policy, it was held that, under the circumstances, the first assignee by his voluntary action in leaving the policy in the possession of the agent for the insured who, in behalf of the insured and in fraud of the first assignee, had pledged it to the second assignee, was estopped to deny the validity of its delivery to the second assignee and could have possession of it only upon paying to the second assignee the amount of his note with interest and costs of suit. *Ibid.*

In the same suit it was held that the second assignee had no right to hold the policy as security for a second note upon which, after it was signed, he had written without authority of the insured a statement that the same policy was to be held as security for it. *Ibid.*

In an action by a judgment creditor against one of three who were the judgment debtors, if the plaintiff alleges in the writ and declaration that he brings the action for the benefit of another person, who was an assignee of the judgment, and the defendant alleges and introduces evidence tending to show that one of the judgment debtors other than the defendant had paid for and was the real owner of the judgment, the assignee being merely the nominal owner, evidence as to the amount, nature, time and place of payment of the consideration of the assignment is admissible. *Flynn v. Howard*, 245.

In such action under such circumstances, the burden is upon the plaintiff to prove, not only that the defendant owed the amount of the judgment, but also that the assignment to the person for whose benefit the action was brought was valid, and that the amount of the judgment was due to him. *Ibid.*

Assignment (continued).

In the same action the plaintiff was held entitled to introduce in evidence a final decree dismissing after a hearing a suit in equity brought to enjoin the action upon the same ground as that set up by the defendant in his answer, the parties being the same. *Flynn v. Howard*, 245.

Where in a suit in equity to compel the specific performance of a contract in writing, alleged to have been signed in behalf of the defendant, to convey certain land to the plaintiff, who was a married woman, it appeared that the contract provided for a sale and conveyance to the plaintiff's husband, and where throughout the trial of the case the plaintiff was recognized by the defendant as being the assignee of the contract, she was treated by this court as having the same rights under the contract that her husband had. *Record v. Littlefield*, 483.

ATTACHMENT.

Construction of a bond given to dissolve an attachment in a proceeding in the Probate Court on a petition of a wife for separate support, where there can be no final judgment for the petitioner, the bond being conditioned upon the payment of whatever final judgment shall be entered. *Maloof v. Abdallah*, 21.

Damages for a breach of such a bond. *Ibid.*

The interest of one of the tenants in common of certain real estate, which was sold by a commissioner appointed by the Probate Court under R. L. c. 184, §§ 31, 47, to make partition of it, in the proceeds from its sale in the hands of the commissioner is not subject to attachment by trustee process. *Travelers Ins. Co. v. Maguire*, 360.

Nor can it be reached and applied in a suit in equity under R. L. c. 159, § 3, cl. 7, to the payment of a debt due from one of the tenants in common of the real estate so sold, as that statute does not extend to a fund in the custody of the law. *Ibid.*

In order to prove that a creditor, who in an action for the collection of his debt caused an attachment of land standing in the name of his debtor to be made, had knowledge of the fact that the debtor before the attachment had delivered a deed of the premises to another, it is not necessary to prove positive knowledge on his part, but intelligible information of the fact, conveyed to him either orally or in writing from a source which ought to be heeded, is evidence upon which such knowledge can be found. *Hughes v. Williams*, 448.

And, while at the trial of such an issue evidence is admissible as to conversations with and conduct on the part of the creditor before the attachment, tending to show such knowledge on his part, evidence of statements made by the creditor or his attorney after the attachment are irrelevant and inadmissible. *Ibid.*

ATTORNEY AT LAW.

The provisions of R. L. c. 173, § 70, that "agreements of attorneys relative to an action or proceeding shall be in writing" in order to be of validity, has no effect upon an agreement, made by an owner of real estate through his attorney for a good consideration, to abide by the judgment of a police court on a petition thereafter to be filed for the enforcement of a mechanic's lien. *Palmer v. Lavers*, 286.

Upon a petition under R. L. c. 193, § 22, for a writ of review after final judgment to enable the petitioner to show that by the law of another State which governed the rights of the parties the petitioner was entitled to recover, an affidavit of a notary public and counsellor at law, who is not called as a witness, giving his opinion as to the law of such other State, is not admissible in evidence, the respondent having had no opportunity to cross-examine the affiant. *Browne v. Fairhall*, 495.

ATTORNEY GENERAL.

Suit by the Attorney General, at the relation of some contributors to a fund received by a committee of strikers, to enforce by an information in equity the application of the fund so raised to the charitable purposes for which it was contributed. *Attorney General v. Bedard*, 378.

AUTOMOBILE.

In an action for personal injuries from being knocked down by an automobile of the defendant negligently driven by the defendant's chauffeur, where there was evidence that the chauffeur, after the happening of the accident, had told the defendant "the whole story, just the way it was," as to his using, for the purpose of obliging a friend of his own, an indirect route to reach a destination appointed for him by the defendant and that the defendant said that he had the right to do so, it was held that such evidence might be found to have been an admission by the defendant that, as between him and the chauffeur, the chauffeur was acting within the scope of his employment. *McKeever v. Ratcliffe*, 17.

In an action for the conscious suffering of one who was run over by an automobile of the defendant, driven by a chauffeur employed by him, who had been in the car to his own home for a noon dinner and was proceeding from his home to the residence of the defendant, it was held that there was no evidence that the chauffeur was acting within the scope of his employment by the defendant at the time of the accident, because the only reasonable inference from the evidence was that the chauffeur was to procure his own meals, and that the time required to do so was his and not the defendant's. *Hartnett v. Grymish*, 258.

In the same action it was held that the mere facts, that the defendant owned the car and that it was being driven by a chauffeur who was hired by him, did not warrant a finding that at the time of the accident the chauffeur was acting within the scope of his employment by the defendant. *Ibid.*

And it also was held under the circumstances to have been proper to exclude at the trial a question, asked of the chauffeur by the plaintiff, as to whether he was willing that the defendant should have known that he took out the car in order to go to his noon meal. *Ibid.*

See also NEGLIGENCE, *In Use of Automobile.*

BANKRUPTCY.

Unlawful Preference.

Evidence at the trial of an action of tort by the trustee in bankruptcy of a firm of building contractors against a bank to recover an alleged unlawful

Bankruptcy (*continued*).

preference under the bankruptcy act of 1898, § 60 a, as amended in 1903 and 1910, which was held not to warrant a finding that a preference had been given. *Voorheis v. National Shawmut Bank*, 69.

Evidence, in an action by a trustee in bankruptcy against a bank to recover the amount of an alleged unlawful preference, upon which, it was held, a finding was warranted that the bankrupt intended to prefer the bank to his other creditors. *Batchelder v. Home National Bank of Milford*, 420.

Further evidence in the same case which, it was held, warranted a finding that the defendant at the time of the payment had reasonable cause to believe that the bankrupt was insolvent and that he intended to prefer the defendant to his other creditors. *Ibid*.

Admission in evidence, at the trial of an action by a trustee in bankruptcy to recover the amount of an alleged unlawful preference, of the bankrupt's schedule of his debts and assets filed in the bankruptcy proceedings after the bankrupt had testified that his financial condition did not change materially from the time when he made the payment alleged to be a preference to the time when he filed the schedule, which, it was held, was merely a formal error and could not have affected injuriously the substantial rights of the parties within the meaning of St. 1913, c. 716, § 1. *Ibid*.

Rights and Powers of Trustee.

Under the bankruptcy act of 1898 as amended by U. S. St. 1910, c. 412, § 8, a trustee in bankruptcy cannot make an appointment under a power which was to be exercised by the bankrupt only by will, even when the bankrupt is alive, much less after he is dead. *Montague v. Silsbee*, 107.

Under U. S. St. 1910, c. 412, § 8, a trustee in bankruptcy, when suing on a negotiable promissory note of which his bankrupt is the payee, has the rights that an attaching creditor would have, which can be no greater than those of the bankrupt. *Jump v. Sparling*, 324.

Effect as Judgment of Proof of Claim.

It is no defense to an action of contract upon an account annexed that the plaintiff's claim previously had been allowed by a referee in bankruptcy in proceedings under the bankruptcy act of 1898 in which no dividend was paid on the bankrupt's estate and the bankrupt was refused a discharge. *Valente v. Cosentino*, 125.

BILLS AND NOTES.

Validity.

Where an agent for the maker of a note, after it was signed and without authority, wrote upon it that a certain insurance policy was to be held as security for it, the holder of the note was held not to be entitled to hold the policy as security for it. *Herman v. Connecticut Mutual Life Ins. Co.* 181.

Whether the note was rendered wholly invalid by the interpolation was not decided. *Ibid*.

Instrument signed by Corporation Officer.

Under the provision of the negotiable instruments act in R. L. c. 73, § 37, if the treasurer of a corporation signs a negotiable promissory note with his own name adding the word "Treasurer" followed by the name of the corporation, executing the note at a meeting of and by authority of the directors of the corporation and believing that he is executing a note of the corporation, and if the note thereupon is given in payment of a claim against the corporation, the treasurer is not liable personally on the note and has a good defense at law if he is sued on it. *Jump v. Sparling*, 324.

Acceptance.

If the holder of a construction mortgage upon buildings in process of erection, upon presentation to him of certain orders of the contractor erecting the buildings, directing that payments be made to a subcontractor from the contractor's "completion payment" and his "thirty-three day after completion payment," and the mortgagee accepts the orders by promising to make the payments when the contractor shall "earn" the respective payments, the mortgagee cannot set up, in defense to an action upon the order by the subcontractor, that the building was not fully completed, if the only reason that it was not fully completed was that the contractor and the mortgagee had agreed to dispense with the construction of a part of the building which was to have been constructed. *Swartsman v. Babcock*, 334.

Indorsement.

In an action by a holder in due course of a negotiable promissory note indorsed by the payee in blank, against such payee as indorser, it is no defense that "before and at the time of the indorsement, it was agreed, orally, that said indorsement was to be without recourse to him." *Aronson v. Nurenberg*, 376.

Negotiability.

The words "as per terms of contract," written after the words "Value received" on the face of a promissory note by the maker before its delivery, do not destroy the negotiability of the note or make its payment to a holder in due course conditional upon the performance of a contract intended to be referred to by the maker. *National Bank of Newbury v. Wentworth*, 30.

Rights of Trustee in Bankruptcy of Holder.

Under U. S. St. 1910, c. 412, § 8, a trustee in bankruptcy, when suing on a negotiable promissory note of which his bankrupt is the payee, has the rights that an attaching creditor would have, which can be no greater than those of the bankrupt. *Jump v. Sparling*, 324.

Small Loans Act.

The provision of St. 1912, c. 675, § 5, amending the small loans act, St. 1911, c. 727, § 17, that "any loan made or note purchased, or indorsement or guarantee furnished by an unlicensed person . . . in violation of this act

shall be void," does not make void in the hands of a *bona fide* purchaser a note given as collateral security for a note given in violation of the act. *Burnes v. New Mineral Fertilizer Co.* 300.

Application of the foregoing rule in an action against the maker and indorsers of a note so purchased in violation of the act, brought by one who, with notice of such violation, purchased it at a foreclosure sale under the terms of a collateral security note, to secure which the note in suit had been pledged by an associate of the unlicensed money lender to one who had no notice of the violation. *Ibid.*

BONA FIDE PURCHASER.

In a suit in equity by the first assignee of a policy of life insurance against a second assignee to gain possession of the policy, it was held that, under the circumstances, the first assignee by his voluntary action in leaving the policy in the possession of the agent for the insured who, in behalf of the insured and in fraud of the first assignee, had pledged it to the second assignee, was estopped to deny the validity of its delivery to the second assignee, and could have possession of it only upon paying to the second assignee the amount of his note with interest and costs of suit. *Herman v. Connecticut Mutual Life Ins. Co.* 181.

In the same suit it was held that the second assignee had no right to hold the policy as security for a second note upon which, after it was signed, he had written without authority of the insured a statement that the same policy was to be held as security for it. *Ibid.*

If a petitioner for the registration of the title to certain land purchased the land at a sale upon an execution issuing in an action in which it had been attached upon mesne process, and at the time of the sale the petitioner knew that before the attachment was made the debtor had delivered a deed of land to another who had not recorded it, the title should not be registered unless the petitioner proves that at the time of the attachment the attaching creditor did not have knowledge of such a deed by the debtor. *Hughes v. Williams*, 448.

And, while at the trial of such an issue evidence is admissible as to conversations with and conduct on the part of the creditor before the attachment, tending to show such knowledge on his part, evidence of statements made by the creditor or his attorney after the attachment are irrelevant and inadmissible. *Ibid.*

BOND.

To dissolve Attachment in Proceedings by Wife for Separate Support.

A bond given to dissolve an attachment in a proceeding in the Probate Court on the petition of a wife for separate support under R. L. c. 153, § 33, in which there can be no final judgment for the petitioner, which is conditioned for the payment of whatever final judgment shall be entered, must be construed according to its subject matter to cover the recovery of whatever sums have been ordered to be paid upon the petition. *Maloof v. Abdallah*, 21.

In fixing the amount for which execution should issue on a judgment for the

penal amount of such a bond, the state of affairs at the time of the hearing must be considered. *Malooof v. Abdallah*, 21.

In such a case the husband, as principal on the bond, is liable for the full amount of the sums ordered to be paid by him, less what he has paid already and not exceeding the penalty of the bond with interest, and a surety is liable for the same amount. *Ibid*.

Under St. 1909, c. 514, § 23.

The provision of a contract with a city for the construction of a bath house, that from monthly payments to the contractor sufficient sums should be deducted and retained by the city "to settle claims for materials or labor furnished for carrying on the contract, notice of which claims, signed and sworn to by the claimants severally, shall have been filed" in the office of the city or with officers as specified in the contract, was held to have satisfied the requirements of St. 1909, c. 514, § 23, as to security. *Hunter v. Boston*, 535.

Such security having been given, a surety company bond, with a condition to the effect that the contractor should "faithfully furnish the material and do the work required of him by the contract," was held to be of no benefit, and to furnish no remedy, to creditors to whom, for materials furnished in the performance of the contract, balances were owed by the contractor, who had become bankrupt. *Ibid*.

Damages for Breach.

In an action on a bond, where a breach of the bond before the bringing of the action has been shown and the amount to which the plaintiff is entitled exceeds the penalty of the bond, execution should be ordered to issue for the amount of the penalty of the bond with interest from the date of the writ. *Malooof v. Abdallah*, 21.

BOSTON.

Constitutionality of St. 1907, c. 384, § 9, giving power to the police commissioner of Boston to regulate unlicensed hawkers and pedlers in the prosecution of their business, and validity of certain regulations made by him. *Commonwealth v. Fox*, 498.

BOSTON SOCIETY OF NATURAL HISTORY.

The equitable restrictions imposed by certain sections of St. 1861, c. 183, on the land designated for the use of the Massachusetts Institute of Technology were not imposed for the benefit of the Boston Society of Natural History, which was granted the use of adjoining land by § 5 of the same statute. *Massachusetts Institute of Technology v. Boston Society of Natural History*, 189.

BOYCOTT.

Suit in equity to enjoin unlawful interference by a labor union with the plaintiff's business, and a boycott, see EQUITY JURISDICTION, *To enjoin Unlawful Interference*.

BRISTOL COUNTY STREET RAILWAY COMPANY.

Suit to foreclose a trust mortgage on street railway property formerly owned by the Bristol County Street Railway Company and later conveyed by receivers of that company to persons who conveyed it to the Taunton and Pawtucket Street Railway Company. *Federal Trust Co. v. Bristol County Street Railway*, 367.

BROKER.

Scope of Authority.

Where a real estate broker, who has been employed by a landowner to sell the land on certain terms, reports to his principal by telephone that a purchaser who will agree to those terms has been found, whereupon the principal says "It is all right; go ahead," this does not give the broker authority to make a contract in writing on those terms in the principal's behalf which will bind him under the statute of frauds. *Record v. Littlefield*, 483.

Authority given by a landowner to a real estate broker to sell a farm for \$7,000, of which \$500 is to be paid in cash and the balance by a note secured by a mortgage on the property, does not estop the landowner from showing, in a suit brought against him for the specific performance of a contract in writing to convey the farm signed by the broker, that the broker had no authority to agree in his behalf to accept the purchaser's promissory note for a part of the \$500 to be paid in cash. *Ibid.*

Commission.

If one real estate broker tells another real estate broker that he has valuable information which will enable the second broker to earn a commission and that he will impart it to him if the second broker will go ahead and do the work and will give him one half of the commission, whereupon the second broker agrees to these terms and thereafter by means of the information negotiates an important lease on which he is paid a commission, the contract to pay the first broker one half of the commission is not bad for indefiniteness and can be enforced. *Collins v. Snow*, 542.

If a real estate broker, in consideration of certain information imparted to him by another real estate broker, agrees that if he earns a commission by reason of the information he will give the informing broker one half of it, this is a contract that can be performed within a year and is not within the statute of frauds. R. L. c. 74, § 1, cl. 5. *Ibid.*

And, if the contract with the customer under which the commission is earned provides for the payment of the commission in instalments to be paid in successive years, this does not change the character of the original contract between the two brokers. *Ibid.*

Where, in an action to recover a commission for having procured an agreement of two persons to pay the defendant \$1,500,000 for a half interest in his shoe machinery business and at least \$1,000,000 for working capital it appeared that, after the conclusion of such an agreement, the defendant made new requirements to which the two persons would not accede, the plaintiff is entitled to go to the jury on counts for a *quantum meruit* and on an account annexed. *Hutchinson v. Plant*, 148.

CAMBRIDGE.

Under St. 1892, c. 421, § 1, authorizing the city of Cambridge to take land and certain rights for a distributing reservoir, that city had no right to acquire or divert any part of underground waters which were the source of a natural stream, at least so far as such acquisition was not necessarily incident to the proper construction and use of its distributing reservoir and of the pipes leading into and out of such reservoir. *Hittinger Fruit Co. v. Cambridge*, 220.

CARRIER.

Of Passengers.

Action against an elevated railway for injuries to a passenger caused by the conduct of a crowd at a station. *O'Day v. Boston Elevated Railway*, 515.

Other actions for personal injuries by passengers against street railway, elevated railway and railroad companies and in subways used by carriers of passengers, see appropriate subtitles under NEGLIGENCE.

CEMETERY.

The exemption of cemeteries from general taxation by St. 1909, c. 490, Part I, § 5, cl. 8, does not exempt them from local assessments for special advantages arising out of public improvements. *Garden Cemetery Corp. v. Baker*, 339.

A private cemetery corporation is subject to a tax assessed upon its cemetery under R. L. c. 26, §§ 26, 27, for street watering if the amount of the tax assessed upon the property is not in excess of the benefit conferred upon the property by the street watering. *Ibid.*

It cannot be said as a matter of law that the real estate of a private cemetery corporation is not benefited by the watering of streets adjacent to the cemetery. *Ibid.*

If, after the incorporation of a cemetery corporation in 1905 under R. L. cc. 78, 123, the incorporators illegally issued and sold capital stock for cash and then adopted by-laws excluding the purchasers of such stock from participation in the business affairs of the corporation and perpetuating its control in themselves and their nominees, and in 1913 the Legislature by a special act confirmed and made valid the issue of stock and the by-laws, the persons to whom the stock was issued thereafter have the rights of stockholders, and, if such rights are not recognized, may enforce them by a petition for a writ of mandamus, and not by a bill in equity. *Granara v. Italian Catholic Cemetery Association*, 387.

St. 1913, c. 292, confirming and making valid the by-laws of the Italian Catholic Cemetery Association, which had been incorporated in 1905 under R. L. cc. 78, 123, and unauthorized acts of its incorporators in voting to issue and in issuing shares of capital stock and fixing the par value of the stock and the rights of holders thereof, occasioned no breach of contract nor impairment of lawfully vested rights of property and is constitutional. *Ibid.*

CHARITY.

It seems, that a corporation, which has no capital stock and is not conducted for profit, no part of the income or profits of whose business can be distributed among members or stockholders, and the object of which is to provide wholesome and sanitary homes for working people and people of small means at moderate cost, is a charitable corporation within the meaning of St. 1909, c. 490, Part I, § 5, cl. 3. *Charlesbank Homes v. Boston*, 14.

But, if it erects on a lot of land belonging to it a large model apartment house, containing besides some general rooms one hundred and three apartments of two, three and four rooms respectively, and these apartments are leased to tenants for small rents, the net income being applied to the charitable purposes of the corporation, the real estate is not "occupied" by the corporation or its officers for the purposes for which it is incorporated within the meaning of St. 1909, c. 490, Part I, § 5, cl. 3, and consequently is not exempt from taxation. *Ibid.*

A trustee under a will purporting to create a public charitable trust is a "person who is aggrieved," under the provisions of R. L. c. 162, § 9, by a decree of the Probate Court declaring the trust invalid, and may appeal therefrom although none of the trust provisions of the will are for his benefit. *Ripley v. Brown*, 33.

Certain provisions of a will providing for the creation of a fund in the hands of trustees to be used to build and maintain a temple devoted to non-sectarian worship of Christ or for an "Industrial school and home," in which the teachings of Christ were to be taught, to be maintained for poor young men who should "show evidence of their worthiness satisfactory to the Trustees," or if, when the sum of \$100,000 was accumulated, there was no "spirit or desire among the people" for either the temple or the school and home, to be devoted to "the deserving poor of" Boston, was held to constitute a valid public charity, and not to be subject to the rule against perpetuities. *Ibid.*

It also was held that the duty of the trustees when the specified fund had been accumulated might be determined upon a petition for instructions filed by them at that time. *Ibid.*

Where a committee, organized for the purpose of supporting a strike of many thousands of operatives in a textile manufacturing centre and also for the support of those strikers who are in suffering and want, in response to an appeal issued by them for money with which to relieve such want, receives a large fund for that purpose, those members of such committee who become the custodians and managers of the fund are under the same obligations as to the fund as if they expressly had been made trustees thereof. *Attorney General v. Bedard*, 378.

They must account for it and can be credited in the accounting only with disbursements made for the purposes of the trust; they must be charged with everything for which they do not properly account; they are bound to keep the fund distinguished from other moneys in their hands, and the consequences of any failure on their part to keep it so distinguished must fall upon themselves. *Ibid.*

Suit by the Attorney General, at the relation of some contributors to a fund received by a committee of strikers, to enforce by an information in equity

the application of the funds so raised to the charitable purposes for which they were contributed. *Attorney General v. Bedard*, 378.

If the custodians and managers of such fund deliver to the chairman of their committee, who is not a custodian or manager but who was present during a large part of the strike and was the secretary of a national organization of the strikers, checks on the funds in a bank which are payable to third persons and which he knows are to be used for other purposes than those for which the fund was given, and such member receives the checks and delivers them to the payees, who thereupon receive the amount thereof, he is jointly responsible with the custodians and managers for the amount of those checks. *Ibid*.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CLERKS OF COURTS.

If a clerk of court neglects to enter a judgment for the plaintiff in an action, in consequence of which the action subsequently is dismissed for want of prosecution, this gives the plaintiff an immediate right of action against the clerk, on which the statute of limitations begins to run from the time when the judgment should have been entered, although the plaintiff's consequent financial loss is not ascertained, or even does not occur, until long afterwards. *McKay v. Cookidge*, 65.

COLLEGE.

False representation by the general agent of a college to one contemplating entrance into the college, that the college had authority to grant a certain degree, was held under the circumstances to be actionable deceit. *Kerr v. Shurtleff*, 167.

COLLEGE OF PHYSICIANS AND SURGEONS.

St. 1883, c. 153, § 1, incorporating the College of Physicians and Surgeons of Boston did not give authority to that corporation to grant the degree of *Dentariæ Medicinæ Doctor*. *Kerr v. Shurtleff*, 167.

CONFLICT OF LAWS.

A woman who in Maine under a Maine statute had procured a divorce with a decree ordering that the libellee pay to her a certain amount per week till further order of the court and that in default of any of such payments for the space of two months an execution was "to issue therefor," and who, within a year thereafter had married another, was allowed to maintain an action of contract here upon an execution for arrears of alimony which had accumulated during four years after the decree. *Taylor v. Stowe*, 248.

CONSTITUTIONAL LAW.

Opinions of the Justices of the Supreme Judicial Court.

Where the justices of this court have given their opinions, under c. 3, art. 2, of the Constitution, that a certain statute, if enacted, would be constitutional, and the statute itself afterwards comes before the court in a judicial controversy in which the question of its constitutionality is raised and is argued by counsel, the question is treated as an open one. *Young v. Duncan*, 346.

Police Power.

Constitutionality of St. 1907, c. 384, § 9, giving power to the police commissioner of Boston to regulate unlicensed hawkers and pedlers in the prosecution of their business, and validity of certain regulations made by him. *Commonwealth v. Foz*, 498.

Interstate Commerce.

The constitutionality of the excise imposed by St. 1909, c. 490, Part III, § 56, on certain foreign business corporations having usual places of business in this Commonwealth was referred to as already established and was reaffirmed, it not being an interference with interstate commerce. *Marconi Wireless Telegraph Co. v. Commonwealth*, 558.

Impairment of Contracts.

St. 1913, c. 292, confirming and making valid the by-laws of the Italian Catholic Cemetery Association, which had been incorporated in 1905 under R. L. cc. 78, 123, and unauthorized acts of its incorporators in voting to issue and in issuing shares of capital stock and fixing the par value of the stock and the rights of holders thereof, occasioned no breach of contract nor impairment of lawfully vested rights of property and is constitutional. *Granara v. Italian Catholic Cemetery Association*, 387.

Full Faith and Credit.

A woman who in Maine under a Maine statute had procured a divorce with a decree ordering that the libelee pay to her a certain amount per week till further order of the court and that in default of any of such payments for the space of two months an execution was "to issue therefor," and who, within a year thereafter had married another, was allowed to maintain an action of contract here upon an execution for arrears of alimony which had accumulated during four years after the decree. *Taylor v. Stowe*, 248.

Vested Rights.

St. 1872, c. 370, (now included in R. L. c. 147, § 18,) providing that the Probate Court may authorize trustees holding real estate to mortgage it for certain purposes is constitutional. *Long v. Simmons Female College*, 135.

St. 1913, c. 292, confirming and making valid the by-laws of the Italian Catholic Cemetery Association, which had been incorporated in 1905 under R. L. cc. 78, 123, and unauthorized acts of its incorporators in voting to issue and in issuing shares of capital stock and fixing the par value of the stock and the rights of holders thereof, occasioned no breach of contract nor impairment of lawfully vested rights of property and is constitutional. *Granara v. Italian Catholic Cemetery Association*, 387.

Right of Trial by Jury.

An agreement by an owner of land, made with one who had filed a statement of a mechanic's lien upon the land, that, if the claimant of the lien would accept a bond signed by the owner without sureties for the release of the lien, he, the owner, would abide by the decision of a police court in which the claimant should file a petition for the enforcement of his lien, is not in contravention of the provision of the Seventh Amendment to the Constitution of the United States, assuring the right of trial by jury, because that right can be waived and by such an agreement it was waived. *Palmer v. Lovers*, 286.

Acts of the plaintiff in an action of tort, in which he has claimed a trial by jury and the defendant has filed a plea in abatement, which were held to have constituted a waiver of his right to have the question of fact raised by the plea passed upon by a jury, no question in regard to his constitutional right to a trial by jury being involved. *Young v. Duncan*, 346.

Right to clear Statement of Charge in Indictment.

Article 12 of the Declaration of Rights requires in an indictment for larceny only such particularity of allegation as may be of service to the defendant in enabling him to understand the charge and prepare for his defense. *Commonwealth v. Farmer*, 507.

Where, therefore, the statutory form of indictment is used, this right is sufficiently protected by R. L. c. 218, § 39, providing for a bill of particulars in case the defendant desires more specific information as to the crime which he is alleged to have committed. *Ibid.*

There is nothing in the provisions of R. L. c. 218 in regard to the form of an indictment for larceny by false pretenses that violates any right secured by the Fourteenth Amendment or any other provision of the Constitution of the United States. *Ibid.*

Right of Defendant not to testify in Criminal Proceeding.

Remarks of the district attorney, at the trial of an indictment for larceny by false pretenses, respecting the failure of the defendants to testify, which were held to have gone rather far, but against which the rights of the defendants were protected fully by instructions of the judge. *Commonwealth v. Farmer*, 507.

Equal Protection of Laws.

The constitutionality of the excise imposed by St. 1909, c. 490, Part III, § 56, on certain foreign business corporations having usual places of busi-

ness in this Commonwealth was referred to as already established and was reaffirmed, it not being an infringement of the constitutional guaranty of equal protection of laws. *Marconi Wireless Telegraph Co. v. Commonwealth*, 558.

A corporation, organized in another State to manufacture and sell automobiles and there maintaining its factory, which has a local and domestic business in this Commonwealth, is none the less subject to such excise because after 1903 (when St. 1903, c. 437, § 75, was in force) and before the passage of the statute of 1909, which made the excise more onerous, it bought land in Boston and built on it a large building of steel, brick and concrete especially adapted for use as a garage, this not being an acquisition of permanent property which would make the imposition of the additional excise unconstitutional as a denial of equal protection of the laws within the principle of *Southern Railway v. Greene*, 216 U. S. 400. *Ibid.*

Under § 70 of the above statute, providing that a foreign business corporation aggrieved by the exaction of an excise may, within six months after the payment of such excise, maintain a petition for the purpose of showing that such excise should not have been enacted, which shall be its exclusive remedy, such a foreign corporation is not deprived of this remedy by reason of its compliance with the requirements imposed by the statutes of this Commonwealth on foreign corporations doing business here. *Ibid.*

Taxation.

The constitutionality of the excise imposed by St. 1909, c. 490, Part III, § 56, on certain foreign business corporations having usual places of business in this Commonwealth was referred to as already established and was reaffirmed. *Marconi Wireless Telegraph Co. v. Commonwealth*, 558.

The mere fact that a foreign corporation may not be able to make profits enough on its domestic business transacted in this Commonwealth to meet such excise, does not make the law unconstitutional as to that corporation nor exempt the corporation from the excise. *Ibid.*

CONTRACT.

Consideration.

A promise by the holder of construction mortgages upon premises, upon which buildings were being erected, to a subcontractor, who had presented to him for payment an order of the contractor which the mortgagee had accepted, that, if the subcontractor would wait another week and in the meantime would complete a second building referred to in a second order, "thereby completing his entire work," he "would receive his money," was held to have been made for a sufficient consideration. *Swartsman v. Babcock*, 334.

What constitutes.

If a beneficiary for life under a trust created by will, who has a power of testamentary appointment over the trust fund which in default of such appointment will go to his heirs at law, declares, in order to procure a loan of money, that he has made a will by which he has appointed the trust

fund to others and that such an appointment will make the appointed property assets for the payment of his creditors, this is not an agreement to make an appointment in favor of the lender of the money nor an agreement not to die intestate. *Montague v. Silsbee*, 107.

If one real estate broker tells another real estate broker that he has valuable information which will enable the second broker to earn a commission and that he will impart it to him if the second broker will go ahead and do the work and will give him one half of the commission, whereupon the second broker agrees to these terms and thereafter by means of the information negotiates an important lease on which he is paid a commission, the contract to pay the first broker one half of the commission is not bad for indefiniteness and can be enforced. *Collins v. Snow*, 542.

Validity.

A provision in a contract of conditional sale that the vendor might "cancel this contract any time prior to the acceptance of payment by an authorized collector of" the vendor, was held not to be an attempt to waive the provisions of R. L. c. 198, § 13, and to be valid. *Drake v. Metropolitan Manuf. Co.* 112.

In a suit in equity by the inhabitants of the town of Revere against the Revere Water Company, seeking to have declared void the contract of sale of the defendant's waterworks to the town which was held in *Seward v. Revere Water Co.* 201 Mass. 453, to have been authorized by the town and to be in accordance with its votes and with statutory authority, that decision was affirmed. *Revere v. Revere Water Co.* 161.

On findings made by a master, it was held that that contract was not made under any mutual mistake. *Ibid.*

It also was held that the fact, that the amount of the bonds to be issued in accordance with the contract was in excess of the debt limit of three per cent of the last tax valuation prescribed by R. L. c. 27, § 4, was not material, it appearing that it did not exceed the limit of ten per cent of that valuation prescribed by R. L. c. 25, § 32, as to bonds issued for the purchase of such rights. *Ibid.*

The provision of R. L. c. 173, § 70, that "agreements of attorneys relative to an action or proceeding shall be in writing" in order to be of validity, has no effect upon an agreement, made by an owner of real estate through his attorney for a good consideration, to abide by the judgment of a police court on a petition thereafter to be filed for the enforcement of a mechanic's lien. *Palmer v. Lavers*, 286.

An agreement by an owner of land, made with one who had filed a statement of a mechanic's lien upon the land, that, if the claimant of the lien would accept a bond signed by the owner without sureties for the release of the lien, he, the owner, would abide by the decision of a police court in which the claimant should file a petition for the enforcement of his lien, is not invalid as ousting the court of its jurisdiction. *Ibid.*

Nor is it in contravention of the provision of the Seventh Amendment to the Constitution of the United States, assuring the right of trial by jury, because that right can be waived and by such an agreement it was waived. *Ibid.*

Where one, who was induced by the deceit of another to lend him money and

Contract (*continued*).

to receive as security shares of stock far less in value than what he was led by the deceit to think they were, upon discovering the fraud did not rescind the contract but retained the collateral and received substantial sums as interest, he was held to have affirmed the contract, but not to have waived his right of action for deceit. *McKinley v. Warren*, 310.

If one real estate broker tells another real estate broker that he has valuable information which will enable the second broker to earn a commission and that he will impart it to him if the second broker will go ahead and do the work and will give him one half of the commission, whereupon the second broker agrees to these terms and thereafter by means of the information negotiates an important lease on which he is paid a commission, the contract to pay the first broker one half of the commission is not bad for indefiniteness and can be enforced. *Collins v. Snow*, 542.

Such a contract is a contract that can be performed within a year and is not within the statute of frauds, R. L. c. 74, § 1, cl. 5. *Ibid*.

And, if the contract with the customer under which the commission is earned provides for the payment of the commission in instalments to be paid in successive years, this does not change the character of the original contract between the two brokers. *Ibid*.

Construction.

Construction of a contract in writing between two street railway companies relating to the operation of cars of one company upon the tracks and by the servants of the other, from which it was held that the second company had no right to compel the first company to pay to it any part of what it had paid in settlement of claims for personal injuries caused by the combined negligence of the first company in suffering an axle of one of its cars to be out of repair, and of the servants of the second company in running the car at an excessive rate of speed, because the agreement dealt only with damage which was due to the fault of one company without fault on the part of the other. *Old Colony Street Railway v. Brockton & Plymouth Street Railway*, 84.

Because certain provisions of such a contract, which required a reference of such matters to a referee, had not been complied with, it was held that one company could not maintain an action at law upon the contract to compel the other company to pay any portion of sums paid by it for injuries so caused, because to permit the maintenance of such an action would be to make a new contract for the parties and to substitute the court for the referee selected and agreed upon by them. *Ibid*.

Upon the assessment of damages in a suit in equity brought by the lessor against his lessee for the breach of a certain agreement collateral to the lease to erect a certain building upon the leased premises which the lessee should have the right to occupy on payment of a stipulated rent until the termination of the lease eight years later, it was held that the plaintiff was entitled to recover as damages only a sum equal to what would be the present worth of such a building subject to the lease. *Wentworth v. Manhattan Market Co.* 91.

In the same suit it appeared that the lease and agreement contained a provision that after the day fixed for the completion of the building an increased rent should be paid in monthly instalments, that by a decision of

this court the defendant was right as to the kind of building required to be erected, but that he had committed a breach of the agreement by failing to erect a building of any kind, so that it was held that, as a part of the damages, the plaintiff was entitled to recover the increased rent from and after the date of the rescript of this court together with interest at the rate of six per cent per annum on each monthly instalment as it became due in case it remained unpaid. *Wentworth v. Manhattan Market Co.* 91.

Where in a contract in writing collateral to a lease the lessee has agreed to erect a certain building "in a manner satisfactory to" the lessor and "in a manner to the reasonable satisfaction of the" lessor, these expressions are to be construed to have the same meaning, and to mean that the work is to be done in such a way as reasonably ought to satisfy the lessor. *Ibid.*

Under a certain contract of conditional sale in which the vendee agreed that the vendor "may cancel this contract any time prior to the acceptance of payment by the authorized collector of" the vendor, it was held that the vendor had a right to retake the goods upon tendering to the vendee the small sum which he had paid, and was not required to give the notice required by R. L. c. 198, § 13. *Drake v. Metropolitan Manuf. Co.* 112.

In a contract in writing providing for the payment of a stipulated royalty on the selling price of an appliance patented by the plaintiff and manufactured and sold by the defendant under an exclusive license from the plaintiff, the word "found," in a provision that the defendant was to be excused from paying the royalty if the plaintiff's patent should be "found at any time to infringe other patents," was construed to mean found by a court of competent jurisdiction. *Potterton v. Condit*, 216.

And the fact that the defendant received from another manufacturer a notice that the alleged patent of the plaintiff was an infringement of a patent used by such manufacturer, which was followed by no further action on his part, is immaterial. *Ibid.*

Under a certain contract between a general contractor, who had agreed with a landowner to erect a new building after demolishing an old building that was on the site, and a subcontractor who had agreed to remove the materials of the old building and clear the land by a day named, it was held that it was within the power of the general contractor to direct the manner of the performance of the plaintiff's work and that it was the subcontractor's duty to conform to his directions so long as he acted reasonably and in good faith under an honest sense of dissatisfaction. *Dubinsky v. Wells Brothers Co.* 232.

A deposit of money, made by a subcontractor under a contract for the removing of an old building with a general contractor, who had a contract with a landowner for the erection of a building after removing the old building then on the site, "which amount is to be forfeited in case the other conditions of the contract are not satisfactorily carried out" by the subcontractor, was held, after a breach by the subcontractor of the contract which inflicted no substantial damage upon the general contractor and gave him a right only to nominal damages, to be intended by the parties merely to secure the performance of the contract and not as liquidated damages. *Ibid.*

On such subcontract being terminated, the subcontractor was held to be entitled to have the amount of the deposit returned to him after the deduction of the amount allowed as nominal damages. *Ibid.*

Contract (continued).

Provisions of a lease of real estate that at the end of the term the premises should be delivered up in as good order and condition "as the same now are," were held to refer to the condition at the date of the lease and not at the time when it was executed five months later, and not to be ambiguous or open to variation by extrinsic evidence. *Cawley v. Jean*, 263.

Further construction of the same covenant as to changes made with the consent of the lessor after entry by the lessee. *Ibid*.

If one contracts with a landowner to remove a ledge of rock to a certain level and for the purpose of the work proceeds to erect a stationary steam engine at a certain place within five hundred feet from dwelling houses, which by a city ordinance cannot be operated lawfully without a license from the board of aldermen, and his application for such a license is refused, the refusal of the license does not excuse him from the performance of his agreement, if he can perform it in a lawful manner by doing the work at somewhat less advantage in another place where he can make use of a license to erect a stationary engine already granted to the landowner. *McDonough v. Almy*, 409.

An agreement by an owner of land, to sell and convey it by a warranty deed "conveying a good and clear title to the same free from all incumbrances," refers to the actual title and not merely to the record title, and it is performed although the owner tenders a deed conveying a title which according to the record is incumbered by an undischarged mortgage, if the conditions of the mortgage have been fully performed and the debt secured thereby has been discharged. *Shanahan v. Chandler*, 441.

An instrument under seal, delivered to one of two joint tortfeasors in consideration of a sum of money paid by him to the person who suffered from the tort, whereby such person covenanted "to forever refrain from instituting, pressing or in any way aiding any claim, demand, action or causes of action for damages . . . for or on account or in any way growing out of" the tort, does not operate as a release of the injured person's cause of action against the other tortfeasor. *Johnson v. Von Scholley*, 454.

A provision in an agreement for the consolidation of three corporations by the issue of shares of preferred stock in a new corporation and the issue of new common stock upon a payment of cash, read, "any depositor failing to pay any instalment of such subscription, as and when the same shall become due and payable, shall, in the absolute discretion of the committee, its successors or assigns, forfeit all right and interest under this plan and agreement and any instalment or instalments theretofore paid," and was held to refer only to forfeiture of common stock and to leave the preferred stock transferable and assignable. *Dreyfus v. Old Colony Trust Co.* 546.

In determining whether a commercial or trading business is interstate, it is not of decisive consequence where the contracts are made or where the title passes. *Marconi Wireless Telegraph Co. v. Commonwealth*, 558.

The Superior Court was held to be "a court of last resort" for an action for personal injuries, within the meaning of those words as used in a policy of insurance against liability. *Tighe v. Maryland Casualty Co.* 463.

The provision of a contract with a city for the construction of a bath house, that from monthly payments to the contractor sufficient sums should be deducted and retained by the city "to settle claims for materials or labor furnished for carrying on the contract, notice of which claims, signed and sworn to by the claimants severally, shall have been filed" in the office of

the city or with officers as specified in the contract was held to have satisfied the requirements of St. 1909, c. 514, § 23, as to security. *Hunter v. Boston*, 535.

Such security having been given, a surety company bond, with a condition to the effect that the contractor should "faithfully furnish the material and do the work required of him by the contract," was held to be of no benefit, and to furnish no remedy, to creditors to whom, for materials furnished in the performance of the contract, balances were owed by the contractor, who had become bankrupt. *Ibid*.

Where a surety company gave to a city such a bond, and the contractor by his failure to comply with the terms of the contract caused the amount which would have been due to him upon his full performance of the contract to be diminished by a certain sum of money, which was less than the amount withheld by the city from the contractor under the terms of the contract, the surety company owes nothing to the city upon its bond. *Ibid*.

Performance and Breach.

Where in a suit in equity seeking to enforce specifically a contract contained in a lease and agreement in writing by which the lessee agreed to erect on the plaintiff's land a building there described, it has been decided by this court that, by reason of the action of the parties caused by their different interpretations of the agreement as to the size and character of the required building, it would be inequitable to enforce the defendant's agreement specifically, and the case is sent to a master for the assessment of damages, the facts that the defendant was right as to the dimensions and character of the required building and that the plaintiff was wrong in asking for a different one do not absolve the defendant from his liability in damages for his failure to erect any building at all. *Wentworth v. Manhattan Market Co.* 91.

In the same suit it appeared that the lease and agreement contained a provision that after the day fixed for the completion of the building an increased rent should be paid in monthly instalments, that by a decision of this court the defendant was right as to the kind of building required to be erected, but that he had committed a breach of the agreement by failing to erect a building of any kind, so that it was held that, as a part of the damages, the plaintiff was entitled to recover the increased rent from and after the date of the rescript of this court together with interest at the rate of six per cent per annum on each monthly instalment as it became due in case it remained unpaid. *Ibid*.

Upon the assessment of damages in the same suit in equity it was held that the plaintiff was entitled to recover as damages only a sum equal to what would be the present worth of such a building subject to the lease. *Ibid*.

Construction of a contract in writing between two street railway companies relating to the operation of cars of one company upon the tracks and by the servants of the other, from which it was held that the second company had no right to compel the first company to pay to it any part of what it had paid in settlement of claims for personal injuries caused by the combined negligence of the first company in suffering an axle of one of its cars to be out of repair, and of the servants of the second company in running the car at an excessive rate of speed, because the agreement dealt only with damage which was due to the fault of one company without fault

Contract (continued).

on the part of the other. *Old Colony Street Railway v. Brockton & Plymouth Street Railway*, 84.

Because certain provisions of such a contract, which required a reference of such matter to a referee, had not been complied with, it was held that one company could not maintain an action at law upon the contract to compel the other company to pay any portion of sums paid by it for injuries so caused, because to permit the maintenance of such an action would be to make a new contract for the parties and to substitute the court for the referee selected and agreed upon by them. *Ibid.*

Where, in an action to recover a commission for having procured an agreement of two persons to pay the defendant \$1,500,000 for a half interest in his shoe machinery business and at least \$1,000,000 for working capital, it appeared that, after the conclusion of such an agreement, the defendant made new requirements to which the two persons would not accede, the plaintiff is entitled to go to the jury on counts for a *quantum meruit* and on an account annexed. *Hutchinson v. Plant*, 148.

A deposit of money, made by a subcontractor under a contract for the removing of an old building with a general contractor who had a contract with a landowner for the erection of a building after removing the old building then on the site, "which amount is to be forfeited in case the other conditions of the contract are not satisfactorily carried out" by the subcontractor, was held, after a breach of the contract by the subcontractor which inflicted no substantial damage upon the general contractor and gave him a right only to nominal damages, to be intended by the parties merely to secure the performance of the contract and not as liquidated damages. *Dubinaky v. Wells Brothers Co.* 232.

On such subcontract being terminated, the subcontractor was held to be entitled to have the amount of the deposit returned to him after the deduction of the amount allowed as nominal damages. *Ibid.*

If the holder of a construction mortgage upon buildings in process of erection, upon presentation to him of certain orders of the contractor erecting the buildings, directing that payments be made to a subcontractor from the contractor's "completion payment" and his "thirty-three day after completion payment," and the mortgagee accepts the orders by promising to make the payments when the contractor shall "earn" the respective payments, the mortgagee cannot set up, in defense to an action upon the order by the subcontractor, that the building was not fully completed, if the only reason that it was not fully completed was that the contractor and the mortgagee had agreed to dispense with the construction of a part of the building which was to have been constructed. *Swartzman v. Babcock*, 334.

If one contracts with a landowner to remove a ledge of rock to a certain level and for the purpose of the work proceeds to erect a stationary steam engine at a certain place within five hundred feet from dwelling houses, which by a city ordinance cannot be operated lawfully without a license from the board of aldermen, and his application for such a license is refused, the refusal of the license does not excuse him from the performance of his agreement, if he can perform it in a lawful manner by doing the work at somewhat less advantage in another place where he can make use of a license to erect a stationary engine already granted to the landowner. *McDonough v. Almy*, 409.

An agreement by an owner of land, to sell and convey it by a warranty deed "conveying a good and clear title to the same free from all incumbrances," refers to the actual title and not merely to the record title, and it is performed although the owner tenders a deed conveying a title which according to the record is incumbered by an undischarged mortgage, if the conditions of the mortgage have been fully performed and the debt secured thereby has been discharged. *Shanahan v. Chandler*, 441.

Evidence at the trial of an action upon such an agreement which was held to warrant a finding that a mortgage which appeared undischarged of record was in fact discharged, so that the title offered by the owner was sufficient. *Ibid.*

In a suit in equity by a materialman against a city to obtain a sum due to him from a contractor from a fund retained by the city out of payments on the contract, it was held that of the amount retained by the city a certain sum never became due to the contractor by reason of his failure to comply with the specifications of the contract, so that the plaintiff was entitled to have applied to the payment of his claim only a proportionate share of the balance of the sum retained by the city. *Hunter v. Boston*, 535.

Where a surety company gave to a city a bond with a condition to the effect that a certain contractor should "faithfully furnish the material and do the work required of him by the contract," and the contractor by his failure to comply with the terms of the contract caused the amount which would have been due to him upon his full performance of the contract to be diminished by a certain sum of money, which was less than the amount withheld by the city from the contractor under the terms of the contract, the surety company owes nothing to the city upon its bond. *Ibid.*

Suits in equity for the specific performance of contracts, see EQUITY JURISDICTION, *Specific Performance*.

Affirmation of Voidable Contract.

Where one, who was induced by the deceit of another to lend him money and to receive as security shares of stock far less in value than what he was led by the deceit to think they were, upon discovering the fraud did not rescind the contract but retained the collateral and received substantial sums as interest, he was held to have affirmed the contract, but not to have waived his right of action for deceit. *McKinley v. Warren*, 310.

Modification.

Jurisdiction of a suit in equity for the rescission on the ground of fraud of a contract of sale and of a conveyance made in accordance therewith cannot be retained for the purpose of changing material stipulations of the contract as to the price to be paid by the purchaser after proper findings have been made that no fraud entered into the transactions. *Revere v. Revere Water Co.* 161.

Implied.

No action can be maintained by a third person against a husband for the value of necessities furnished to his wife who is living apart from him by mutual consent, if, before the necessities were furnished, the Probate Court, on

Contract (*continued*).

a petition by the wife under R. L. c. 153, § 33, had ordered the husband to pay a certain sum to the wife periodically for her support and that order remained in force and was complied with by the husband. *Malden Hospital v. Murdock*, 73.

Where, in an action to recover a commission for having procured an agreement of two persons to pay the defendant \$1,500,000 for a half interest in his shoe machinery business and at least \$1,000,000 for working capital it appeared that, after the conclusion of such an agreement, procured by the plaintiff, the defendant made new requirements to which the two persons would not accede, the plaintiff is entitled to go to the jury on counts for a *quantum meruit* and on an account annexed. *Hutchinson v. Plant*, 148.

In Writing.

Proper treatment by a trial judge of ambiguous words in a contract as to the employment of a salesman who was to be paid, besides a salary, "1% commission on all book accounts." *Seckendorf v. Wachtel-Pickert Co.* 126.

A certain order for printed blanks, which contained no promise to pay but ended with the words "Ordered by," followed by the defendant's name, it was held, might be found not to contain the entire contract as to the transaction described therein, so that a verbal arrangement that the goods were not to be paid for by the person signing the order might be shown in evidence and be given its full effect. *Lyman B. Brooks Co. v. Wilson*, 205.

Provision of a lease of real estate that at the end of the term the premises should be delivered up in as good order and condition "as the same now are," were held to refer to the condition at the date of the lease and not at the time when it was executed five months later, and not to be ambiguous or open to variation by extrinsic evidence. *Cawley v. Jean*, 263.

Where the parties to a contract without fraud or mistake have reduced it to writing in language that is not obscure, it is held to express the final conclusion reached, and all previous and contemporaneous oral discussion and written memoranda are assumed to have been rejected or to have been merged in it. *Goldenberg v. Taglino*, 357.

In a contract in writing, by which G purchased from T the controlling interest in a certain corporation, the stipulation, "G agrees that so long as he and T are stockholders in said corporation T shall continue in the employ of the corporation," cannot be varied or amplified by oral evidence in regard to matters which were agreed upon in the negotiations that resulted in the contract. *Ibid.*

In an action by a holder in due course of a negotiable promissory note indorsed by the payee in blank, against such payee as indorser, it is no defense that "before and at the time of the indorsement it was agreed, orally, that said indorsement was to be without recourse to him." *Aronson v. Nurenberg*, 376.

In an action for personal injuries against one of two joint tortfeasors, where there was in evidence an instrument which on its face was a covenant by the plaintiff not to sue the co-tortfeasor, it was held that further evidence offered by the defendant tending to show that negotiations which occurred between the plaintiff and the co-tortfeasor previous to the execution of the covenant were for the purpose of a settlement and discharge of the claim for damages alleged in the declaration should have been admitted, because the

defendant, not being a party to the instrument in writing, had a right to show by oral evidence that it did not express the terms of the actual compromise. *Johnson v. Von Scholley*, 454.

Building Contract.

If the holder of a construction mortgage upon buildings in process of erection, upon presentation to him of certain orders of the contractor erecting the buildings, directing that payments be made to a subcontractor from the contractor's "completion payment" and his "thirty-three day after completion payment," and the mortgagee accepts the orders by promising to make the payments when the contractor shall "earn" the respective payments, the mortgagee cannot set up, in defense to an action upon the order by the subcontractor, that the building was not fully completed, if the only reason that it was not fully completed was that the contractor and the mortgagee had agreed to dispense with the construction of a part of the building which was to have been constructed. *Swartzman v. Babcock*, 334.

In a bill in equity by a materialman against a city to compel the payment of a debt due to him from a bankrupt contractor by enforcing his right to share in a fund withheld from the contractor by the city in compliance with St. 1909, c. 514, § 23, the proper procedure is for the plaintiff to bring suit in equity in behalf of himself and all other persons having similar claims, instead of making the other claimants defendants, as the plaintiff did in the present case. *Hunter v. Boston*, 535.

The provision of a contract with a city for the construction of a bath house, that from monthly payments to the contractor sufficient sum should be deducted and retained by the city "to settle claims for materials or labor furnished for carrying on the contract, notice of which claims, signed and sworn to by the claimants severally, shall have been filed" in the office of the city or with officers as specified in the contract, were held to have satisfied the requirements of the St. 1909, c. 514, § 23, as to security. *Ibid.*

Such security having been given, a surety company bond, with a condition to the effect that the contractor should "faithfully furnish the material and do the work required of him by the contract," was held to be of no benefit, and to furnish no remedy, to creditors to whom, for materials furnished in the performance of the contract, balances were owed by the contractor, who had become bankrupt. *Ibid.*

Where a surety company gave to a city such a bond, and the contractor by his failure to comply with the terms of the contract caused the amount which would have been due to him upon his full performance of the contract to be diminished by a certain sum of money, which was less than the amount withheld by the city from the contractor under the terms of the contract, the surety company owes nothing to the city upon its bond. *Ibid.*

In a suit in equity by a materialman against a city to obtain a sum due to him from a contractor from a fund retained by the city out of payments on the contract, it was held that of the amount retained by the city a certain sum never became due to the contractor by reason of his failure to comply with the specifications of the contract, so that the plaintiff was entitled to have applied to the payment of his claim only a proportionate share of the balance of the sum retained by the city. *Ibid.*

For Conveyance of Land.

An agreement by an owner of land, to sell and convey it by a warranty deed "conveying a good and clear title to the same free from all incumbrances," refers to the actual title and not merely to the record title, and it is performed although the owner tenders a deed conveying a title which according to the record is incumbered by an undischarged mortgage, if the conditions of the mortgage have been fully performed and the debt secured thereby has been discharged. *Shanahan v. Chandler*, 441.

Evidence at the trial of an action upon such an agreement which was held to warrant a finding that a mortgage which appeared undischarged of record was in fact discharged, so that the title offered by the owner was sufficient. *Ibid.*

Statute of Frauds.

See FRAUDS, STATUTE OF.

CONVERSION.

In an action for the alleged conversion of certain personal property of the plaintiff left by him in a vacant building belonging to the defendant which formerly had been occupied by the plaintiff as a tenant, where a material question was whether a certain police officer was acting as the agent of the defendant in preventing the plaintiff from removing his property from the building, it was held that there was no evidence warranting a finding that the police officer was the agent of the defendant, and that for this reason a certain conversation between the defendant and the police officer was not admissible in evidence. *Jean v. Cawley*, 271.

In such an action if it appears that when the plaintiff went to the building for the purpose of removing his property a police officer acting as the agent of the defendant told the plaintiff to leave the building at once or incur the immediate arrest of himself and all his employees, and not to remove the property without the defendant's permission, and that thereupon the plaintiff left the building and the property remained in the possession and control of such police officer as the agent of the defendant until after the plaintiff had gone, this is evidence of a conversion without showing a demand by the plaintiff for his property before bringing the action. *Ibid.*

Transactions between the plaintiff in an action for conversion and a person, other than the defendant, who also might have been held liable for the conversion, which were held as a matter of law to constitute a loan to the plaintiff and not a satisfaction of the claim or a transfer of title to the property from the plaintiff, and to afford no defense to the action. *Rosenberg v. National Dock & Storage Warehouse Co.* 518.

CORPORATION.

Officers and Agents.

Under the provision of the negotiable instruments act in R. L. c. 73, § 37, if the treasurer of a corporation signs a negotiable promissory note with his own name adding the word "Treasurer" followed by the name of the cor-

poration, executing the note at a meeting of and by authority of the directors of the corporation and believing that he is executing a note of the corporation, and if the note thereupon is given in payment of a claim against the corporation, the treasurer is not liable personally on the note and has a good defense at law if he is sued on it. *Jump v. Sparling*, 324.

If, after the incorporation of a cemetery corporation in 1905 under R. L. cc. 78, 123, the incorporators illegally issued and sold capital stock for cash and then adopted by-laws excluding the purchasers of such stock from participation in the business affairs of the corporation and perpetuating its control in themselves and their nominees, and in 1913 the Legislature by a special act confirmed and made valid the issue of stock and the by-laws, the persons to whom the stock was issued thereafter have the rights of stockholders, and, if such rights are not recognized, may enforce them by a petition for a writ of mandamus, and not by a bill in equity. *Granara v. Italian Catholic Cemetery Association*, 387.

A bill in equity by stockholders in a corporation, alleged to have been brought on behalf of the plaintiffs and all other stockholders who might wish to join therein, may be maintained against the corporation and officers and others in control of its affairs for an accounting refused by them, as to shares of stock issued to the individual defendants as a gratuity, dividends declared and paid on such shares, moneys received and illegally disbursed by the defendants in the management of the corporation and fees and compensation paid to themselves in excess of reasonable emolument or rightful demands. *Ibid.*

By-laws.

St. 1913, c. 292, confirming and making valid the by-laws of the Italian Catholic Cemetery Association, which had been incorporated in 1905 under R. L. cc. 78, 123, and unauthorized acts of its incorporators in voting to issue and in issuing shares of capital stock and fixing the par value of the stock and the rights of holders thereof, occasioned no breach of contract nor impairment of lawfully vested rights of property and is constitutional. *Granara v. Italian Catholic Cemetery Association*, 387.

Foreign.

Where one who is the donee of a power of appointment over property, held by trustees under the will of the donor who were appointed by a probate court of this Commonwealth, dies domiciled in another State and exercises that power by making an appointment by will, so much of the trust property as consists of shares of stock of corporations incorporated by States other than this Commonwealth is not subject to a succession tax under St. 1909, c. 490, Part IV, § 1; c. 527, § 8, although the certificates for the shares are in this Commonwealth. *Clark v. Treasurer & Receiver General*, 292.

As to the excise imposed on foreign corporations by St. 1909, c. 490, Part III, § 56, see *Marconi Wireless Telegraph Co. v. Commonwealth*, 558.

Under § 70 of the above statute, providing that a foreign business corporation aggrieved by the exaction of an excise may, within six months after the payment of such excise, maintain a petition for the purpose of showing that such excise should not have been enacted, which shall be its exclusive remedy, such a foreign corporation is not deprived of this remedy by reason

Corporation (*continued*).

of its compliance with the requirements imposed by the statutes of this Commonwealth on foreign corporations doing business here. *Marconi Wireless Telegraph Co. v. Commonwealth*, 558.

Municipal Corporations.

See that title.

Rights of Shareholders under Consolidation Agreement.

A provision in an agreement for the consolidation of three corporations by the issue of shares of preferred stock in a new corporation and the issue of new common stock upon payment of cash, read "Any depositor failing to pay any instalment of such subscription, as and when the same shall become due and payable, shall, in the absolute discretion of the committee, its successors or assigns, forfeit all right and interest under this plan and agreement and any instalment or instalments theretofore paid" and was held to refer only to forfeiture of common stock and to leave the preferred stock transferable and assignable. *Dreyfus v. Old Colony Trust Co.* 546.

Dividend.

Whether a stockholder in a corporation cannot maintain an action against the corporation for the amount of a dividend without a previous demand, and therefore the statute of limitations cannot begin to run upon a claim for a dividend until such a demand has been made, was mentioned as a question which it was not necessary to determine in *Boston & Roxbury Mill Corp. v. Tyndale*, 425.

And, whether a corporation, which in compliance with an order of court has deposited the amount of certain unclaimed dividends in a separate fund apart from its other assets, holds the fund in trust for the payment of such dividends when properly claimed, so that, until the trust is repudiated or the right of a claimant is denied, the statute of limitations does not begin to run against such claimant, was mentioned as a question which was not passed upon. *Ibid*.

COVENANT.

Not to sue.

An instrument under seal, delivered to one of two joint tortfeasors in consideration of a sum of money paid by him to the person who suffered from the tort, whereby such person covenanted "to forever refrain from instituting, pressing or in any way aiding any claim, demand, action or causes of action for damages . . . for or on account or in any way growing out of" the tort, does not operate as a release of the injured person's cause of action against the other tortfeasor. *Johnson v. Von Scholley*, 454.

In an action for personal injuries against one of two joint tortfeasors, where there was in evidence an instrument which on its face was a covenant by the plaintiff not to sue the co-tortfeasor, it was held that further evidence offered by the defendant tending to show that negotiations which occurred between the plaintiff and the co-tortfeasor previous to the execution of the

covenant were for the purpose of a settlement and discharge of the claim for damages alleged in the declaration should have been admitted, because the defendant, not being a party to the instrument in writing, had a right to show by oral evidence that it did not express the terms of the actual compromise. *Johnson v. Von Scholley*, 454.

CUSTOM.

In an action by a workman against a building contractor by whom he was employed for injuries caused by the giving way of a spreader in the window frame of a building in process of construction, on which the plaintiff stepped in attempting to pass from a staging on the inside of an unfinished brick wall to a staging on the outside, in order that the proof of a custom among workmen to step on a spreader in going from an inside staging to an outside staging may affect the rights of the parties, such custom must have been uniform, universal and of such long continuance that all concerned might be presumed to know it. *Coyne v. Byrne*, 99.

Consequently the custom's existence would not make it the duty of the defendant to instruct a competent carpenter who had been in his employ for eight years that in putting in a spreader he must make it strong enough for the workmen to step on. *Ibid.*

In an action against a street railway company for personal injuries caused by the plaintiff being thrown to the ground by the starting of a street car as he was in the act of boarding it, it is not necessary, in order to hold the defendant liable on the ground that the conductor was negligent in allowing the starting signal to be given by a person not an employee, for the plaintiff to show that starting signals habitually had been so given. *Frink v. Boston Elevated Railway*, 121.

DAMAGES.

For Property taken or injured under Statutory Authority.

Under St. 1892, c. 421, § 1, authorizing the city of Cambridge to take land and certain rights for a distributing reservoir, that city had no right to acquire or divert any part of underground waters which were the source of a natural stream, at least so far as such acquisition was not necessarily incident to the proper construction and use of its distributing reservoir and of the pipes leading into and out of such reservoir. *Hittinger Fruit Co. v. Cambridge*, 220.

Consequently a fruit grower through whose land a natural brook flowed, the waters of which were diverted by the taking by the city of Cambridge of the land containing the source of the brook for the construction of such reservoir, has no remedy by a petition for the assessment of damages and may maintain a suit in equity against the city for appropriate relief. *Ibid.*

Upon the water commissioners of the town of Plainville, acting under authority given to them by St. 1908, c. 404, §§ 2, 9, which was accepted by the town, purchasing land adjacent to Ten Mile River and driving wells there for the purpose of a town water supply, the owner of a mill pond which was fed by the river and by water which fed that river became entitled to maintain, under § 4 of the statute, a petition for the assessment of damages

Damages (*continued*).

which he suffered by reason of water being diverted from his pond by the wells, although none of his land was taken by the town and although no certificate was filed as required by § 3 of the statute. *Spaulding v. Plainville*, 321.

Such a petition is brought within the two years' period of limitation from the time of the taking provided by the statute, if it is brought within two years from the time of the driving of permanent wells, although, more than two years before it was brought, temporary test wells had been driven by the town. *Ibid.*

In Contract.

In an action on a bond, where a breach of the bond before the bringing of the action has been shown and the amount to which the plaintiff is entitled exceeds the penalty of the bond, execution should be ordered to issue for the amount of the penalty of the bond with interest from the date of the writ. *Maloof v. Abdallah*, 21.

In fixing the amount for which execution should issue on a judgment for the penal amount of a bond to dissolve an attachment given in proceedings upon the petition of a wife for separate support, the state of affairs at the time of the hearing must be considered. *Ibid.*

In such case the husband, as principal on the bond, is liable for the full amount of the sums ordered to be paid by him, less what he has paid already and not exceeding the penalty of the bond with interest, and a surety is liable for the same amount. *Ibid.*

Upon the assessment of damages in a suit in equity brought by the lessor against his lessee for the breach of a certain agreement collateral to the lease to erect a certain building upon the leased premises, to be completed at a date just before the filing of the bill, which the lessee should have the right to occupy on payment of a stipulated rent until the termination of the lease eight years later, it was held that the plaintiff was entitled to recover as damages only a sum equal to what would be the present worth of such a building subject to the lease. *Wentworth v. Manhattan Market Co.* 91.

In such a suit in equity, at a hearing before a master for the assessment of damages, it was held that under the circumstances it was proper to exclude evidence offered by the defendant to show that before the time when the building was required to be completed the defendant received a bid in writing from a responsible person, which he did not accept. *Ibid.*

In the same suit it appeared that the lease and agreement contained a provision that after the day fixed for the completion of the building an increased rent should be paid in monthly instalments, that by a decision of this court the defendant was right as to the kind of building required to be erected, but that he had committed a breach of the agreement by failing to erect a building of any kind, so that it was held that, as a part of the damages, the plaintiff was entitled to recover the increased rent from and after the date of the rescript of this court together with interest at the rate of six per cent per annum on each monthly instalment as it became due in case it remained unpaid. *Ibid.*

In an action for a breach by a lessee of real estate of a covenant to return the premises with their permitted alterations at the end of the term in as good condition as they were in at the beginning of it, the plaintiff on proving the breach of covenant is entitled to recover such a sum of money as at the end

of the term would put the premises in the condition in which the tenant was bound to leave them. *Cawley v. Jean*, 263.

Indorsement on the back of a lease of real estate and personal property, that contained an agreement of the lessee to purchase the leased property at the end of the term, by reason of which it was held that the lessee, having chosen to limit his remedy for loss by fire to a deduction from the purchase price, could not claim, in case he did not make the purchase, any right to deduct the amount of such loss from the amount due from him as rent under the lease. *Ibid.*

In Tort.

In an action for deceit against the general agent of a college by one to whom the defendant falsely represented that the college had authority to grant a degree which the plaintiff was seeking, which led the plaintiff to take the prescribed course before he discovered the deceit, the plaintiff was held not to be entitled to have considered, as bearing upon the question of damages, what he had paid for tuition, because the measure of damages to which the plaintiff was entitled in case the defendant was liable was the difference in value between what the plaintiff received and what he would have received if the representations of the defendant had been true. *Kerr v. Shurtleff*, 167.

In the foregoing case, it appearing that the plaintiff had received an education in dentistry without a degree, and that, if the representations of the defendant had been true he would have received both the education and the degree, the measure of damages was held to be what it would cost the plaintiff in time and money to get the degree in dentistry. *Ibid.*

Where in an action for deceit it appears that the plaintiff, by the false and fraudulent representation of the defendant that he had an option to purchase certain shares of stock for a certain price which was in excess of the option price, was induced to lend the defendant an excessive amount of money and to take the shares of stock as collateral security, it is proper for the trial judge to adopt the well established rule of damages that the plaintiff is entitled to recover the difference between the real value of the thing at the time it was received and what its value would have been if the representation had been true instead of false, which in the present case was computed to be the difference between the amount of money lent by the plaintiff and the value of the collateral. *McKinley v. Warren*, 310.

In Equity.

Where in a suit in equity to compel the specific performance of a contract this court has decided that the enforcement of specific performance would be inequitable and has ordered the assessment of damages, the court of equity in which the case is pending, having acquired jurisdiction of the case, will retain it for the assessment of damages, although the damages might have been recovered in an action at law. *Wentworth v. Manhattan Market Co.* 91.

Upon the assessment of damages in a suit in equity brought by a lessor against his lessee for the breach of a certain agreement collateral to the lease to erect a certain building upon the leased premises, which the lessee should have the right to occupy on payment of a stipulated rent until the termi-

Damages (continued).

- nation of the lease, it was held that the plaintiff was entitled to recover as damages only a sum equal to what would be the present worth of such a building subject to the lease. *Wentworth v. Manhattan Market Co.* 91.
- In such a suit in equity, at a hearing before a master for the assessment of damages, it was held that under the circumstances it was proper to exclude evidence offered by the defendant to show that before the time when the building was required to be completed the defendant received a bid in writing from a responsible person, which he did not accept. *Ibid.*
- In the same suit it appeared that the lease and agreement contained a provision that after the day fixed for the completion of the building an increased rent should be paid in monthly instalments, that by a decision of this court the defendant was right as to the kind of building required to be erected, but that he had committed a breach of the agreement by failing to erect a building of any kind, so that it was held that, as a part of the damages, the plaintiff was entitled to recover the increased rent from and after the date of the rescript of this court together with interest at the rate of six per cent per annum on each monthly instalment as it became due in case it remained unpaid. *Ibid.*
- In a suit in equity against a labor union to enjoin unlawful interference with the plaintiff's business, on findings of a master it was held that, while the plaintiff was entitled to damages caused to its business by the unlawful acts of the defendants, the findings of the master were not sufficient to warrant an assessment of damages without a further hearing. *New England Cement Gun Co. v. McGovern*, 198.
- No damages were allowed to the plaintiff in a suit to compel the transfer to him of shares in the preferred stock of a corporation organized for the consolidation of three corporations. *Dreyfus v. Old Colony Trust Co.* 546.

Liquidated.

- A deposit of money, made by a subcontractor under a contract for the removing of an old building with a general contractor, who had a contract with a landowner for the erection of a building after removing the old building then on the site, "which amount is to be forfeited in case the other conditions of the contract are not satisfactorily carried out" by the subcontractor, was held, after a breach of the contract by the subcontractor which inflicted no substantial damage upon the general contractor and gave him a right only to nominal damages, to be intended by the parties merely to secure the performance of the contract and not as liquidated damages. *Dubinsky v. Wells Brothers Co.* 232.
- On such subcontract being terminated, the subcontractor was held to be entitled to have the amount of the deposit returned to him after the deduction of the amount allowed as nominal damages. *Ibid.*

DEATH.

- Upon an agreed statement of facts, in which it is stated that a certain person disappeared in 1818 and never was heard of again although diligent inquiries were made, this court under St. 1913, c. 716, § 5, may draw the inference that he was dead in 1825 and consequently had died before

February 14, 1831, when the six year period of limitation on his right to sue for a certain dividend expired. *Boston & Roxbury Mill Corp. v. Tyn-dale*, 425.

An administrator, who has appeared in an action brought by his intestate for personal injuries, cannot be allowed to amend the declaration by adding a count under R. L. c. 171, § 2, St. 1907, c. 375, for causing the death of the plaintiff's intestate. *Church v. Boylston & Woodbury Cafe Co.* 231.

Other actions for causing death, see NEGLIGENCE, *Causing Death*.

DECEIT.

A statement by the general agent of a college to a student who is considering entering the college in order to gain an education in dentistry and a degree therein, "We can fix you up nicely in three years, make you a D.M.D.," is in effect a statement that the college has authority to grant that degree; and, if the college has no such authority, the statement may be found to have been not merely a promise, but a false statement of fact. *Kerr v. Shurtleff*, 167.

Such a representation, made to a student considering entrance into the college for the purpose of procuring, through a three years' course of study, an education and a degree in dentistry, is a material representation, and, if the statement was false and was made by the agent as of his own knowledge without his knowing it to be true or false and for the purpose of inducing the student to act upon it, which, without knowing of its falsity, the student did to his loss, the student may maintain an action for deceit against the agent. *Ibid.*

In such action it was held to be no defense that a condition of the granting of the degree which was one of the regulations of the college, that three fourths of the faculty should consent to it, was not complied with because, at the meeting of the faculty when the plaintiff's record was considered, less than three fourths of the members were present. *Ibid.*

In the same action statements by the defendant to other physicians in years succeeding the statement to the plaintiff, tending to show that the defendant did not know whether the college had the right to grant the degree, were held to be admissible on the issue, whether the defendant made the statement to the plaintiff as of his own knowledge without knowing whether it was true or not. *Ibid.*

And the admission in evidence of a statement by the defendant to another physician, made the year following that to the plaintiff, that the college had a right to grant the degree because of their having the right to grant the degree of Doctor of Medicine, was held to have helped and not to have harmed the defendant. *Ibid.*

At the trial of such an action, an instruction to the jury in substance that, if they were satisfied that the defendant made an absolute promise to grant the degree to the plaintiff, at the time having no intention to carry out such promise, and that he made it for the purpose of deceiving the plaintiff, they should find for the plaintiff, where there was no evidence calling for such an instruction, was held to have been inapplicable, so that the exceptions must be sustained. *Ibid.*

In the same action, in sustaining exceptions of the defendant and ordering a

Deceit (*continued*).

new trial, it was said that, because, if the jury found that the alleged statement had been made by the defendant, it was a statement of fact although it involved a question of law, the trial judge had erred in ruling at the request of the defendant in substance that the statement made by the defendant as to the authority of the college to grant the degree of D.M.D. was "not a statement of a past or present fact." *Kerr v. Shurtleff*, 167.

Also that it was erroneous to instruct the jury that the right of the college to grant that degree was a question of law. *Ibid*.

And that a further instruction that the plaintiff could not recover for any misstatement by the defendant as to the legal right of the college to grant the degree was erroneous. *Ibid*.

As also was an instruction that "a misstatement of the law cannot form the basis of any action for deceit." *Ibid*.

In such action the plaintiff is not entitled to have considered, as bearing upon the question of damages, what he paid for tuition, because the measure of the damages to which the plaintiff is entitled in case the defendant is liable is the difference in value between what the plaintiff received and what he would have received if the representations of the defendant had been true. *Ibid*.

And, it appearing that the plaintiff had received an education in dentistry without a degree, and that, if the representations of the defendant had been true he would have received both the education and the degree, the measure of damages was held to be what it would cost the plaintiff in time and money to get the degree in dentistry. *Ibid*.

In an action for deceit, where, if the testimony of the plaintiff in direct examination was believed, the plaintiff had a right of recovery, and his statements in cross-examination conflicted with those in his direct examination, the case is for the jury. *Ibid*.

In an action for deceit, the proof of a false and fraudulent representation made by the defendant that he had an option to purchase certain shares of stock for a certain price, which was in excess of the option price, whereby he induced the plaintiff to lend him an excessive amount of money and to take the shares as collateral security, will entitle the plaintiff to recover, this being an intentional misstatement of a present material fact. *McKinley v. Warren*, 310.

Where in such an action it appears that the plaintiff, when he discovered the fraud, did not exercise his right to rescind the contract by returning the note and the certificate of stock held as collateral, but retained the collateral and received substantial sums as interest on the note and waited a number of years before bringing the action for deceit, this shows an affirmation of the contract, but is not a waiver of the fraud by which it was induced. *Ibid*.

In such an action, it is proper for the trial judge to adopt the well established rule of damages that the plaintiff is entitled to recover the difference between the real value of the thing at the time it was received and what its value would have been if the representation had been true instead of false, which in the present case was computed to be the difference between the amount of money lent by the plaintiff and the value of the collateral. *Ibid*.

In an action for deceit, in which it was shown that the defendant by false and fraudulent representations induced the plaintiff to lend him a sum of

money upon certain shares of stock as collateral, taking the note of the defendant and his wife for the amount of the loan, it is right for the trial judge to refuse to rule as matter of law that the plaintiff by taking the note accepted it in payment of the loan. *McKinley v. Warren*, 310.

DEVISE AND LEGACY.

General Rule of Construction.

In case of irreconcilable differences between provisions in a will, a clear and unambiguous provision, coming later in the will, controls, as being more likely to express the final purpose of the testator. *Turnbull v. Whitmore*, 210.

"Heirs."

In a will in which, after provisions relating to a trust for the benefit of a sister and her children, the testator directed that on the death of any child of the sister without issue, "the portion of the one so dying shall revert and become part of the residue of" the estate, discharged of the trust, and gave the residue "to my brothers and sisters before mentioned and their heirs," the words, "and their heirs," were held to be words of limitation intended to show that the gift made was an absolute one to the brothers and sisters named so that the interest there given vested in the brothers and sisters at the death of the testator. *State Street Trust Co. v. Morris*, 429.

Designation of Legatee.

Under the provisions of a certain will, a legacy to "domestic servants" was held not to give a legacy to a "stableman or groom" in the testator's employ. *Murphy v. Lawrence*, 39.

Legatee's Rights.

Under R. L. c. 128, § 13, as amended by St. 1910, c. 560, § 1, a legatee of money under the will of a testator, whose estate is alleged to be involved in proceedings in the Land Court for a registration of the title to a parcel of land, has no interest in the land which can make him a party aggrieved by a decree of the Land Court concerning it and give him a right to claim an appeal. *Waban Rose Conservatories v. Hall*, 533.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICIL.

Facts which were held not inconsistent with a finding that a certain man's domicile at the time of his death was in the county in this Commonwealth in which he lived so that the Probate Court of that county has jurisdiction of a petition for the proof of his will, where it appeared that at one time he had had his domicile in a city in another State, had declared his purpose to give up his residence there and to establish his home in the city in this Commonwealth and that this declared intention was manifested by unequivocal acts. *Emery v. Emery*, 227.

ELECTION.

The filing in the Probate Court in behalf of a surviving husband of a certain writing withdrawing all objection to proof of the instrument presented was held not to deprive such husband of his right under R. L. c. 135, § 16, to file in the registry of probate a writing waiving the provisions made for him in the will and claiming such portion of his wife's estate as he would have taken if she had died intestate. *McGrath v. Quinn*, 27.

ELECTRICITY.

Negligence in use of, see NEGLIGENCE, *In Use of Electricity*.

ELEVATED RAILWAY.

Negligence in operation of an elevated railway, see NEGLIGENCE, *Elevated Railway*.

EMINENT DOMAIN.

Under St. 1892, c. 421, § 1, authorizing the city of Cambridge to take land and certain rights for a distributing reservoir, that city had no right to acquire or divert any part of underground waters which were the source of a natural stream, at least so far as such acquisition was not necessarily incident to the proper construction and use of its distributing reservoir and of the pipes leading into and out of such reservoir. *Hittinger Fruit Co. v. Cambridge*, 220.

Acts of a town in the diverting of waters from a mill pond without the taking of any land of the owner of the mill pond or the filing of a certificate of taking of the waters, which were held to be capable of justification only on the assumption that the town took the waters by right of eminent domain for its water supply. *Spaulding v. Plainville*, 321.

In the same case the owner of the mill pond therefore was allowed to maintain a petition for the assessment of his damages. *Ibid*.

EMPLOYER'S LIABILITY.

See that subtitle under NEGLIGENCE.

EQUITABLE REPLEVIN.

See that subtitle under EQUITY JURISDICTION.

EQUITABLE RESTRICTIONS.

The land of the Massachusetts Institute of Technology abutting on Boylston, Clarendon and Newbury Streets in Boston is subject to equitable restrictions, in favor of the owners of lots on those streets opposite the open rectangle of land of which that corporation was granted the use of two thirds, that such two thirds of the rectangle shall forever be kept as an open space

or for the use of the corporation for its educational and scientific purposes, and that, if and while so used, the corporation shall not cover with its buildings more than one third part of the area of the land designated for its use. *Massachusetts Institute of Technology v. Boston Society of Natural History*, 189.

The effect of the passage of St. 1861, c. 183, §§ 3, 4, 6, 7, and of the sales thereafter made by the Commonwealth under § 4 of that statute, of lots of land on Boylston, Clarendon and Newbury Streets in Boston facing the land held by the Massachusetts Institute of Technology, was to create equitable restrictions for the benefit of the subsequent purchasers of those lots, subject to which the Commonwealth by St. 1903, c. 438, released to the Massachusetts Institute of Technology all rights which had been retained by the Commonwealth in the land held by that corporation under St. 1861, c. 183. *Ibid*.

In the equitable restriction imposed by § 3 of St. 1861, c. 183, it was not intended to prohibit the passing of a bare legal title, but to require that the land, if not used for the educational purposes of the corporation, should be kept as an open space. *Ibid*.

The equitable restriction imposed by § 7 of that statute does not require that the location of the buildings of the Institute when once fixed to the satisfaction of the Governor and Council, shall not be changed. *Ibid*.

The equitable restrictions imposed by certain sections of St. 1861, c. 183, on the land designated for the use of the Massachusetts Institute of Technology were not imposed for the benefit of the Boston Society of Natural History, which was granted the use of adjoining land by § 5 of the same statute. *Ibid*.

EQUITY JURISDICTION.

Laches.

A bill in equity, which was filed in June, 1911, by a private cemetery corporation to remove a cloud upon its title to the cemetery alleged to have been created by a sale in August, 1905, for the collection of a tax assessed illegally in 1902, was held not to have been barred by laches although the purchaser at the sale paid taxes assessed to the plaintiff for the years 1904 and 1905, and taxes upon the premises were assessed to such purchaser in 1906 and 1907, and he paid them. *Garden Cemetery Corp. v. Baker*, 339.

Statute of Limitations.

A bill in equity, which was filed in June, 1911, by a private cemetery corporation to remove a cloud upon its title to the cemetery alleged to have been created by a sale in August, 1905, for the collection of a tax assessed illegally in 1902, was held to have been brought within the six years allowed by R. L. c. 13, § 75, as amended by St. 1905, c. 325, § 3. *Garden Cemetery Corp. v. Baker*, 339.

For Alternative Relief.

It is not a valid objection to a bill in equity that the plaintiff seeks to remove a cloud from the title to certain land created by what he alleges to have been a sale for the collection of a tax illegally assessed, and also, in case the

Equity Jurisdiction (continued).

sale should be declared to have been valid, seeks to redeem the land from the sale in accordance with St. 1909, c. 490, Part II, § 76. *Garden Cemetery Corp. v. Baker*, 339.

In a suit in equity by a fruit grower, through whose land a natural brook flowed, against a city that without authority had diverted the waters of the brook in taking the land that contained the source of the brook for the construction of a distributing reservoir, a decree is proper which orders the defendant either to cease to interfere with the natural flow of the brook as it was when the defendant began the construction of its reservoir, or else to deliver daily into the brook not less than the number of gallons of water which was the average daily flow of the brook in its natural condition. *Hittinger Fruit Co. v. Cambridge*, 220.

For an Accounting.

Suit by the Attorney General, at the relation of some contributors to a fund received by a committee of strikers, to enforce by an information in equity the application of the fund so raised to the charitable purposes for which it was contributed. *Attorney General v. Bodard*, 378.

Specific Performance.

Where in a suit in equity to compel the specific performance of a contract this court has decided that the enforcement of specific performance would be inequitable and has ordered the assessment of damages, the court of equity in which the case is pending, having acquired jurisdiction of the case, will retain it for the assessment of damages, although the damages might have been recovered in an action at law. *Wentworth v. Manhattan Market Co.* 91.

Where, in a suit in equity seeking to enforce specifically a contract contained in a lease and agreement in writing by which the lessee agreed to erect on the plaintiff's land a building there described, it has been decided by this court that, by reason of the action of the parties caused by their different interpretations of the agreement as to the size and character of the required building, it would be inequitable to enforce the defendant's agreement specifically, and the case is sent to a master for the assessment of damages, the facts that the defendant was right as to the dimensions and character of the required building and that the plaintiff was wrong in asking for a different one, do not absolve the defendant from his liability in damages for his failure to erect any building at all. *Ibid.*

In a suit in equity to enforce an agreement by the defendant, made in consideration of the plaintiff releasing a claim of a mechanic's lien on real estate of the defendant upon the defendant giving him a bond without sureties for the payment of final judgment establishing his lien, that the defendant would not appeal from a judgment of a police court on a petition by the plaintiff for the enforcement of the lien, on an appeal from a final decree enjoining the defendant from prosecuting his appeal from, and ordering him to pay to the plaintiff the amount of, the judgment rendered on the petition to enforce the lien, it was held that the decree must be affirmed, because it did not appear that the findings of fact upon which it was founded were plainly wrong. *Palmer v. Lavers*, 286.

Where in a suit in equity to compel the specific performance of a contract in writing, alleged to have been signed in behalf of the defendant, to convey certain land to the plaintiff, who was a married woman, it appeared that the contract provided for a sale and conveyance to the plaintiff's husband, and where throughout the trial of the case the plaintiff was recognized by the defendant as being the assignee of the contract, she was treated by this court as having the same rights under the contract that her husband had. *Record v. Littlefield*, 483.

Authority given by a landowner to a real estate broker to sell a farm for \$7,000, of which \$500 is to be paid in cash and the balance by a note secured by a mortgage on the property, does not estop the landowner from showing, in a suit brought against him for the specific performance of a contract in writing to convey the farm signed by the broker, that the broker had no authority to agree in his behalf to accept the purchaser's promissory note for a part of the \$500 to be paid in cash. *Ibid*.

Rescission of Contract.

Jurisdiction of a suit in equity for the rescission on the ground of fraud of a contract of sale and of a conveyance made in accordance therewith cannot be retained for the purpose of changing material stipulations of the contract as to the price to be paid by the purchaser after proper findings have been made that no fraud entered into the transactions. *Revere v. Revere Water Co.* 161.

Suit founded on Contract involving Validity of Patent.

The United States courts have not exclusive jurisdiction of a suit in equity founded on an alleged breach of a contract in writing to pay a stipulated royalty on the selling price of an appliance patented by the plaintiff and manufactured and sold by the defendant under an exclusive license from the plaintiff. *Potterton v. Condit*, 216.

Information by Attorney General.

Suit by the Attorney General, at the relation of some contributors to a fund received by a committee of strikers, to enforce by an information in equity the application of the fund so raised to the charitable purposes for which it was contributed. *Attorney General v. Bedard*, 378.

Bill for Instructions.

Instructions were not given as to the duty of trustees under a certain will under circumstances which had not yet arisen. *Ripley v. Brown*, 33.

In a certain suit in equity by a trustee under a will for instructions, it was held that, as to a fund in the hands of the trustee which should be distributed in accordance with the residue clause of the will, the executor's accounts being fully settled, it was not necessary that an administrator *de bonis non* be appointed, but that the trustee should make the distribution. *State Street Trust Co. v. Morris*, 429.

To relieve from Results of Fraud.

In a suit in equity to compel the redelivery of a mortgage note payable to the plaintiff, which the defendant, who already held a mortgage on real estate of the plaintiff, had procured from him to secure a further loan which never was made, it was held that redelivery of the note to the plaintiff should not be made conditional upon his paying the amount previously loaned him by the defendant. *Pogrotzky v. Levatinsky*, 116.

A bill in equity by stockholders in a corporation, alleged to have been brought on behalf of the plaintiffs and all other stockholders who might wish to join therein, may be maintained against the corporation and officers and others in control of its affairs for an accounting, refused by them, as to shares of stock issued to the individual defendants as a gratuity, dividends declared and paid on such shares, moneys received and illegally disbursed by the defendants in the management of the corporation and fees and compensation paid to themselves in excess of reasonable emolument or rightful demands. *Granara v. Italian Catholic Cemetery Association*, 387.

To foreclose Mortgage of Property of Street Railway Company.

The Superior Court has jurisdiction of a suit in equity to foreclose a trust mortgage upon the property of a street railway company in this Commonwealth. *Federal Trust Co. v. Bristol County Street Railway*, 367.

In a suit in equity for the foreclosure of a certain trust mortgage upon the property of a Massachusetts street railway company, which had been sold by a receiver by judicial sale to persons who formed a new corporation to take it over, it was held that, on the facts appearing, the new corporation was estopped to deny the validity of the mortgage on the ground that there were fatal defects in the organization of the original company. *Ibid.*

In the above suit it also was held, that, because of the explicit nature of the decree as to the mortgage, a provision in the decree of the United States Circuit Court giving the receiver power to sell, in substance that the sale should be subject, not only to the mortgage in question, but also to other ordinary liens, and that the purchaser should have the right to contest the establishment of such liens, could not be construed as giving to the new company a right, after the sale and conveyance to it under the circumstances above described, to contest the validity of the mortgage. *Ibid.*

It also was held, that the issuing of certain new bonds in substitution for those originally issued did not invalidate the mortgage. *Ibid.*

To reach Property conveyed with Intent to hinder, delay and defraud Creditors.

On an appeal from a decree dismissing a bill in equity against a debtor of the plaintiff, the debtor's wife and a purchaser of a certain hotel property to reach and apply in satisfaction of the debt owed to the plaintiff certain notes alleged to have been given by the purchaser to the debtor's wife in purchase of an equity in the hotel property which the debtor was alleged to have conveyed to his wife with intent to hinder, delay and defraud his creditors, it was held that, on findings of a master upon evidence which was not reported, the decree should be affirmed. *Irving v. Shaw*, 432.

To reach and apply Equitable Assets.

An interest in a fund, derived from a sale of real estate upon a petition for partition, which is in the hands of a commissioner appointed in such proceedings, cannot be reached and applied by a suit in equity under R. L. c. 159, § 3, cl. 7, to the payment of a debt due from one of the tenants in common of the real estate so sold, as that statute does not extend to a fund in the custody of the law. *Travelers Ins. Co. v. Maguire*, 360.

To compel Payment of Claim of Materialman out of Fund retained under St. 1909, c. 514, § 23.

In a suit in equity by a materialman against a city to obtain a sum due to him from the contractor from a fund retained by the city out of payments on the contract, it was held that of the amount so retained by the city a certain sum never became due to the contractor by reason of his failure to comply with the specifications of the contract, so that the plaintiff was entitled to have applied to the payment of his claim only a proportionate share of the balance of the sum retained by the city. *Hunter v. Boston*, 535.

In a bill in equity by a materialman against a city to compel the payment of a debt due to him from a bankrupt contractor by enforcing his right to share in a fund withheld from the contractor by the city in compliance with St. 1909, c. 514, § 23, the proper procedure is for the plaintiff to bring suit in equity in behalf of himself and all other persons having similar claims, instead of making the other claimants defendants, as the plaintiff did in the present case. *Ibid.*

Equitable Replevin.

One who received an assignment of a policy of life insurance from the insured without the policy itself, which by reason of fraud of an agent of the insured was not delivered to him, may maintain a suit in equity for possession of the policy against a person to whom it has been delivered by the agent without right and who secretes it so that it cannot be reached in an action at law. *Herman v. Connecticut Mutual Life Ins. Co.* 181.

In a suit in equity by the first assignee of a policy of life insurance against a second assignee to gain possession of the policy, it was held that, under the circumstances, the first assignee by his voluntary action in leaving the policy in the possession of the agent for the insured who, in behalf of the insured and in fraud of the first assignee, had pledged it to the second assignee, was estopped to deny the validity of its delivery to the second assignee, and could have possession of it only upon paying to the second assignee the amount of his note with interest and costs of suit. *Ibid.*

In the same suit it was held that the second assignee had no right to hold the policy as security for a second note upon which, after it was signed, he had written without authority of the insured a statement that the same policy was to be held as security for it. *Ibid.*

To compel Action of Corporation Officers.

If, after the incorporation of a cemetery corporation in 1905 under R. L. cc. 78, 123, the incorporators illegally issued and sold capital stock for cash

and then adopted by-laws excluding the purchasers of such stock from participation in the business affairs of the corporation and perpetuating its control in themselves and their nominees, and in 1913 the Legislature by a special act confirmed and made valid the issue of stock and the by-laws, the persons to whom the stock was issued thereafter have the rights of stockholders, and, if such rights are not recognized, may enforce them by a petition for a writ of mandamus, and not by a bill in equity. *Granara v. Italian Catholic Cemetery Association*, 387.

To compel Transfer of Shares in Consolidating Corporation.

In a suit in equity, by the assignee of the rights of preferred shares of a holder of both preferred and common shares in a corporation consolidating three corporations, to compel the committee of consolidation to transfer the preferred shares to him, the assignor having defaulted in payment of a deposit required on his shares of common stock, it was held that a provision of the consolidation plan regarding a forfeiture of rights under the agreement in case of a failure to pay a subscription for common shares referred only to forfeiture of rights of the defaulting stockholder in respect to his common shares, and that the plaintiff was entitled to a decree for the transfer to him of a certificate of deposit representing his assignor's preferred shares; but that he was not entitled to damages. *Dreyfus v. Old Colony Trust Co.* 546.

To restrain Diversion of Watercourses.

A fruit grower through whose land a natural brook flowed, the waters of which were diverted by the taking by the city of Cambridge of the land containing the source of the brook for the construction of such reservoir, was held under the circumstances to have no remedy by a petition for the assessment of damages but to be entitled to maintain a suit in equity against the city for appropriate relief. *Hittinger Fruit Co. v. Cambridge*, 220.

In a suit in equity by such fruit grower against the city, a decree is proper which orders the defendant either to cease to interfere with the natural flow of the brook as it was when the defendant began the construction of its reservoir, or else to deliver daily into the brook not less than the number of gallons of water which was the average daily flow of the brook in its natural condition. *Ibid.*

And it is not a valid objection to this decree, that the natural flow of the brook varied and was uncertain in amount from time to time and that the plaintiff was entitled only to a variable supply of water. *Ibid.*

To enjoin Unlawful Interference.

Upon the facts appearing in a suit in equity by a corporation, which was the exclusive licensee in a certain territory authorized to operate a machine for projecting through a hose a mixture of cement, sand and water called "gunite" upon walls, against the officers of a labor union, it was held that an injunction should be issued restraining the defendants from causing or taking part in any boycott or any sympathetic strike against the plaintiff or its customers for the purpose of preventing the use by the plaintiff of

its machinery and process or for the purpose of compelling it to discharge any of its non-union workmen. *New England Cement Gun Co. v. McGivern*, 198.

In the same suit upon certain findings of fact by a master it was held that, while the plaintiff was entitled to damages caused to its business by the unlawful acts of the defendants, the findings of the master were not sufficient to warrant an assessment of damages without a further hearing. *Ibid.*

To enjoin Prosecution of an Appeal.

In a suit in equity to enforce an agreement by the defendant, made in consideration of the plaintiff releasing a claim of a mechanic's lien on real estate of the defendant upon the defendant giving him a bond without sureties for the payment of final judgment establishing his lien, that the defendant would not appeal from a judgment of a police court on a petition by the plaintiff for the enforcement of the lien, on an appeal from a final decree enjoining the defendant from prosecuting his appeal from, and ordering him to pay to the plaintiff the amount of, the judgment rendered on the petition to enforce the lien, it was held that the decree must be affirmed, because it did not appear that the findings of fact upon which it was founded were plainly wrong. *Palmer v. Lavers*, 286.

To remove Cloud on Title.

It is not a valid objection to a bill in equity that the plaintiff seeks to remove a cloud from the title to certain land created by what he alleges to have been a sale for the collection of a tax illegally assessed, and also, in case the sale should be declared to have been valid, seeks to redeem the land from the sale in accordance with St. 1909, c. 490, Part II, § 76. *Garden Cemetery Corp. v. Baker*, 339.

A bill in equity, which was filed in June, 1911, by a private cemetery corporation to remove a cloud upon its title to the cemetery alleged to have been created by a sale in August, 1905, for the collection of a tax assessed illegally in 1902, was held to have been brought within the six years allowed by R. L. c. 13, § 75, as amended by St. 1905, c. 325, § 3, and not to have been barred by laches although the purchaser at the sale paid taxes assessed to the plaintiff for the years 1904 and 1905, and taxes upon the premises were assessed to such purchaser in 1906 and 1907, and he paid them. *Ibid.*

To redeem from Execution Sale.

It was held that a ruling by the judge who heard a suit in equity to redeem from an execution sale certain "wild and uncultivated land," that certain sums paid for labor in cutting down bushes and clearing the land were "reasonable expenses incurred for repairs and improvements," which, among other sums, the provisions of R. L. c. 178, § 33, require that the plaintiff should tender to the defendant as a condition precedent to redemption, could not be said to have been wrong as a matter of law. *Young v. Reynolds*, 129.

In such a suit the defendant is entitled to be credited, in the computation of the sum which the plaintiff must pay in order to redeem, with interest on sums paid by him for taxes while in possession of the land and reasonable expenses incurred for repairs and improvements. *Ibid.*

Equity Jurisdiction (*continued*).

And the matter of costs is left under R. L. c. 178, § 41, to the discretion of the presiding judge except in the cases specified in that section; and therefore an exception by a plaintiff in such a suit to the awarding of costs to the defendant must be overruled where the evidence upon which the award was made is not before this court. *Young v. Reynolds*, 129.

- Where, in such a suit the defendant is awarded costs, it is proper to require that such costs be deposited with the clerk of the court for the use of the defendant. *Ibid*.

And, in such a suit, where after a hearing the amount to be paid to the defendant for redemption is determined and costs are awarded to the defendant, a decree should order that, if such amount and costs are not paid by the plaintiff to the defendant within a certain time, a final decree stating that fact and dismissing the suit with costs shall be entered. *Ibid*.

To redeem from Tax Sale.

It is not a valid objection to a bill in equity that the plaintiff seeks to remove a cloud from the title to certain land created by what he alleges to have been a sale for the collection of a tax illegally assessed, and also, in case the sale should be declared to have been valid, seeks to redeem the land from the sale in accordance with St. 1909, c. 490, Part II, § 76. *Garden Cemetery Corp. v. Baker*, 339.

- A bill in equity, which was filed in June, 1911, by a private cemetery corporation to remove a cloud upon its title to the cemetery alleged to have been created by a sale in August, 1905, for the collection of a tax assessed illegally in 1902, or, if the assessment were declared legal, to redeem the land from the sale, was held to have been brought within the six years allowed by R. L. c. 13, § 75, as amended by St. 1905, c. 325, § 3, and not to have been barred by laches although the purchaser at the sale paid taxes assessed to the plaintiff for the years 1904 and 1905, and taxes upon the premises were assessed to such purchaser in 1906 and 1907, and he paid them. *Ibid*.

Damages.

Where in a suit in equity to compel the specific performance of a contract this court has decided that the enforcement of specific performance would be inequitable and has ordered the assessment of damages, the court of equity in which the case is pending, having acquired jurisdiction of the case, will retain it for the assessment of damages, although the damages might have been recovered in an action at law. *Wentworth v. Manhattan Market Co.* 91.

For other cases as to damages in suits in equity, see the appropriate subtitle under DAMAGES.

EQUITY PLEADING AND PRACTICE.

Parties.

- A bill in equity cannot be maintained by a voluntary unincorporated association in the name of the association. *Herbst v. Fidelia Musical & Educational Corp.* 174.

In the above suit, the association being described as composed of three individuals "and many other members too numerous to mention," the bill was treated as if it had been brought by those individuals suing in behalf of themselves and of all the other members of the association. *Herbst v. Fidelity Musical & Educational Corp.* 174.

In a bill in equity by a materialman against a city to compel the payment of a debt due to him from a bankrupt contractor by enforcing his right to share in a fund withheld from the contractor by the city in compliance with St. 1909, c. 514, § 23, the proper procedure is for the plaintiff to bring a suit in equity in behalf of himself and all other persons having similar claims, instead of making the other claimants defendants, as the plaintiff did in the present case. *Hunter v. Boston*, 535.

Bill.

It is not a valid objection to a bill in equity that the plaintiff seeks to remove a cloud from the title to certain land created by what he alleges to have been a sale for the collection of a tax illegally assessed, and also, in case the sale should be declared to have been valid, seeks to redeem the land from the sale in accordance with St. 1909, c. 490, Part II, § 76. *Garden Cemetery Corp. v. Baker*, 339.

In a bill in equity by a materialman against a city to compel the payment of a debt due to him from a bankrupt contractor by enforcing his right to share in a fund withheld from the contractor by the city in compliance with St. 1909, c. 514, § 23, the proper procedure is for the plaintiff to bring a suit in equity in behalf of himself and all other persons having similar claims, instead of making the other claimants defendants, as the plaintiff did in the present case. *Hunter v. Boston*, 535.

Supplemental Bill.

Although in an action at law no recovery can be had on facts that happened after the date of the writ, in equity this is otherwise and rights accruing to the plaintiff after the filing of the bill which grew out of the matter on which the bill was founded may be made the subject of a supplemental bill, and accordingly under Equity Rule 25 they may be pleaded by way of amendment to the original bill. *Collins v. Snow*, 542.

Demurrer.

A single demurrer to an entire bill in equity, which contains allegations entitling the plaintiff to some of the relief which he seeks, will be overruled, although other relief sought is not a proper subject for a bill in equity. *Granara v. Italian Catholic Cemetery Association*, 387.

Replication.

Where the record accompanying a bill of exceptions in a suit in equity contains no copy of a replication, and the bill of exceptions does not state that the suit was heard on the bill and answer, and a memorandum for a final decree states that the suit was heard "upon bill and answer and was sub-

mitted on evidence and argument by counsel," the case will be treated by this court as one decided upon evidence introduced by the parties. *Young v. Reynolds*, 129.

Amendment.

Although in an action at law no recovery can be had on facts that happened after the date of the writ, in equity this is otherwise and rights accruing to the plaintiff after the filing of the bill which grew out of the matter on which the bill was founded may be made the subject of a supplemental bill, and accordingly under Equity Rule 25 they may be pleaded by way of amendment to the original bill. *Collins v. Snow*, 542.

Rules of Court.

Equity Rule 25. *Collins v. Snow*, 542.

Master.

Motion to reopen hearings.

Where in a suit in equity which was referred to a master, the hearing before the master was confined by agreement of the parties to two issues, a motion, presented to the master after the first draft of his report was submitted to the parties, seeking a reopening of the hearings for the hearing and reporting of evidence on certain specified issues, should be denied by the master, if it appears that some of the specifications in the motion relate to issues other than the two to which by agreement the hearings were confined, and the master finds that those two issues have been fully tried. *Herbst v. Fidelia Musical & Educational Corp.* 174.

Motion to recommit.

Motion to recommit a case to a master for a reopening of the case for hearings on issues, which by agreement of parties as to matters in issue were not open, was held properly to have been denied. *Herbst v. Fidelia Musical & Educational Corp.* 174.

Report.

Where a master's report in a suit in equity does not state the evidence, the findings of the master cannot be reversed unless wrong as matter of law, and in the present case a finding by a master, that the state of an account between the parties had not been changed by an announcement made by the plaintiff to the defendant that he intended to charge off a counter claim of the defendant against his own claim, was held to disclose no error of law. *Goldenberg v. Taglino*, 357.

Findings of Judge.

Where a suit in equity is reported to this court with the consent of the parties by the trial judge, who states his findings of fact but does not report the evidence, the findings of the judge must be taken to be true. *Potterton v. Condit*, 216.

Findings of fact by a judge who heard a suit in equity for the enjoining of an appeal from a judgment of a police court on a petition to enforce

a mechanic's lien, which were held on appeal not to have been clearly wrong. *Palmer v. Lovers*, 286.

Costs.

A decree in a suit in equity awarding costs should state the amount of the costs. *Young v. Reynolds*, 129.

In a suit in equity to redeem from an execution sale, the matter of costs is left under R. L. c. 178, § 41, to the discretion of the presiding judge except in the cases specified in that section; and therefore an exception by a plaintiff in such a suit to the awarding of costs to the defendant must be overruled where the evidence upon which the award was made is not before this court. *Ibid.*

Where in such a suit the defendant is awarded costs, it is proper to require that such costs be deposited with the clerk of the court for the use of the defendant. *Ibid.*

Exceptions to Rulings of Judge.

After a hearing of a suit in equity at which one of the parties saves exceptions to rulings of the judge, the judge has no power to enter a final decree until the exceptions are disposed of. *Young v. Reynolds*, 129.

If a judge attempts to enter a final decree under such circumstances, it will be treated in the consideration of the exceptions merely as an order for a decree, and an appeal therefrom will be dismissed. *Ibid.*

Where the record accompanying a bill of exceptions in a suit in equity contains no copy of a replication, and the bill of exceptions does not state that the suit was heard on the bill and answer, and a memorandum for a final decree states that the suit was heard "upon bill and answer and was submitted on evidence and argument by counsel," the case will be treated by this court as one decided upon evidence introduced by the parties. *Ibid.*

In a suit in equity to redeem from an execution sale, the matter of costs is left under R. L. c. 178, § 41, to the discretion of the presiding judge except in the cases specified in that section; and therefore an exception by a plaintiff in such a suit to the awarding of costs to the defendant must be overruled where the evidence upon which the award was made is not before this court. *Ibid.*

Decree.

A final decree in a suit in equity should not contain findings of fact which are not relevant to relief given by the decree. *Pogotzky v. Levatinsky*, 116.

A decree in a suit in equity awarding costs should state the amount of the costs. *Young v. Reynolds*, 129.

In a suit in equity for the redemption of land from an execution sale, where after a hearing the amount to be paid to the defendant for redemption under R. L. c. 178, § 33, is determined and costs are awarded to the defendant, a decree should order that, if such amount and costs are not paid by the plaintiff to the defendant within a certain time, a final decree stating that fact and dismissing the suit with costs shall be entered. *Ibid.*

After a hearing of a suit in equity at which one of the parties saves exceptions to rulings of the judge, the judge has no power to enter a final decree until the exceptions are disposed of. *Ibid.*

If a judge attempts to enter a final decree under such circumstances, it will be treated in the consideration of the exceptions merely as an order for a decree, and an appeal therefrom will be dismissed. *Young v. Reynolds*, 129.

In a suit in equity, where the plaintiff had established his right to receive one half of a commission, which was payable to the defendant in instalments, and some of the instalments were not payable when the bill was filed but became payable and were paid to the defendant while the case was pending, but the plaintiff had failed to amend his bill under Equity Rule 25 by adding allegations that the subsequent instalments of the commission had been paid, it was ordered that, if within a time named the bill should be amended by adding such allegations, the decree should require the payment to the plaintiff of one half of the entire commission, and that otherwise the recovery should be limited to one half of so much of the commission as had been paid to the defendant when the bill was filed. *Collins v. Snow*, 542.

Appeal.

If a judge attempts to enter a final decree in a suit in equity while exceptions are undisposed of, it will be treated in the consideration of the exceptions merely as an order for a decree, and an appeal therefrom will be dismissed. *Young v. Reynolds*, 129.

In a suit in equity to enforce an agreement by the defendant, made in consideration of the plaintiff releasing a claim of a mechanic's lien on real estate of the defendant upon the defendant giving him a bond without sureties for the payment of final judgment establishing his lien, that the defendant would not appeal from a judgment of a police court on a petition by the plaintiff for the enforcement of the lien, on an appeal from a final decree enjoining the defendant from prosecuting his appeal from, and ordering him to pay to the plaintiff the amount of, the judgment rendered on the petition to enforce the lien, it was held that the decree must be affirmed, because it did not appear that the findings of fact upon which it was founded were plainly wrong. *Palmer v. Lavers*, 286.

In a suit in equity, where a master's report does not state the evidence, the findings of the master cannot be reversed unless wrong as matter of law, and in the present case a finding by a master, that the state of an account between the parties had not been changed by an announcement made by the plaintiff to the defendant that he intended to charge off a counter claim of the defendant against his own claim, was held to disclose no error of law. *Goldenberg v. Taglino*, 357.

Report.

Where a suit in equity is reported to this court with the consent of the parties by the trial judge, who states his findings of fact but does not report the evidence, the findings of the judge must be taken to be true. *Potterton v. Condit*, 216.

ESTOPPEL.

If a beneficiary for life under a trust created by will, who has a power of testamentary appointment over the trust fund which in default of such

appointment is to go to his heirs at law, declares, in order to procure a loan of money, that he has made a will by which he has appointed the trust fund to others and that such an appointment will make the appointed property assets for the payment of his creditors, and afterwards dies intestate, such declaration creates no estoppel that will bind the heirs at law. *Montague v. Silsbee*, 107.

And even if one of the heirs at law joined in making the statement to induce the loan, he would be estopped to deny merely that a will had been made and existed at the time of the statement and would not be precluded from showing that a will then in existence afterwards was revoked. *Ibid.*

A policy of life insurance is a non-negotiable chose in action, and, if by his own voluntary action the insured or one to whom the insured has assigned his rights so clothes a third person with the *indicia* of ownership as to justify others in regarding him either as the rightful owner or as having authority from that owner to transfer the policy, the owner or a rightful assignee is estopped to set up his title against a *bona fide* purchaser for value from such third person. *Herman v. Connecticut Mutual Life Ins. Co.* 181.

In a suit in equity by the first assignee of a policy of life insurance against a second assignee to gain possession of the policy, it was held that, under the circumstances, the first assignee by his voluntary action in leaving the policy in the possession of the agent for the insured who, in behalf of the insured and in fraud of the first assignee, had pledged it to the second assignee, was estopped to deny the validity of its delivery to the second assignee, and could have possession of it only upon paying to the second assignee the amount of his note with interest and costs of suit. *Ibid.*

In the same suit it was held that the second assignee had no right to hold the policy as security for a second note upon which, after it was signed, he had written without authority of the insured a statement that the same policy was to be held as security for it. *Ibid.*

In a suit in equity for the foreclosure of a certain trust mortgage upon the property of a Massachusetts street railway company, which had been sold by a receiver by judicial sale to persons who formed a new corporation to take it over, it was held that, on the facts appearing, the new corporation was estopped to deny the validity of the mortgage on the ground that there were fatal defects in the organization of the original company. *Federal Trust Co. v. Bristol County Street Railway*, 367.

Authority given by a landowner to a real estate broker to sell a farm for \$7,000, of which \$500 is to be paid in cash and the balance by a note secured by a mortgage on the property, does not estop the landowner from showing, in a suit brought against him for the specific performance of a contract in writing to convey the farm signed by the broker, that the broker had no authority to agree in his behalf to accept the purchaser's promissory note for a part of the \$500 to be paid in cash. *Record v. Littlefield*, 483.

In a suit in equity by the town of Ipswich against the Proprietors of Jeffries Neck Pasture and a certain grantee from that corporation, to set aside a deed against the authorization of which the plaintiff had not been permitted to vote as the holder of certain undrawn rights in the defendant corporation, conveyed to it in 1788 by the Commoners of Ipswich, it was held that the defendants were not in a position to assert that the plaintiff was

Estoppel (continued).

estopped by a plea of the Commoners, in an action by another person in 1723, asserting that they had no right in the common land left undisposed of. *Ipswich v. Proprietors of Jeffries Neck Pasture*, 487.

EVIDENCE.

Presumptions and Burden of Proof.

Applications of the rule, *res ipsa loquitur*, see NEGLIGENCE, *Res ipsa loquitur*. Matters of common knowledge, see that subtitle, *post*.

Circumstances under which, at the trial of an action of contract for the price of milk sold and delivered, the plaintiff, on the evidence and the presumption of innocence, was held to be entitled to go to the jury, although he had introduced no direct evidence that the percentage of milk solids contained in the milk sold by him to the defendant was that required by R. L. c. 56, § 56. *Whitcomb v. Boston Dairy Co.* 24.

It cannot be said as a matter of law that the real estate of a private cemetery corporation is not benefited by the watering of streets adjacent to the cemetery. *Garden Cemetery Corp. v. Baker*, 339.

Certain language used by a judge in his charge to a jury in an action by an employee for personal injuries against four persons, alleged to be copartners doing business under a certain firm name, which was held to have been erroneous because the jury naturally would assume from it that the description in the writ was some evidence that the defendants were copartners, whereas, if the judge chose to mention the description in the writ, he should have instructed the jury plainly that it was not evidence at all. *Ibanes v. Winston*, 469.

Where the only eyewitness of an accident resulting in death, on his direct, on his cross and on his redirect examination, makes contradictory statements in attempting to describe the circumstances attending the accident, it is for the jury to weigh his conflicting testimony and decide what the facts were. *Kane v. Boston Elevated Railway*, 101.

In an action against a street railway company for personal injuries caused by the plaintiff being thrown to the ground by the starting of a street car as he was in the act of boarding it, it is not necessary, in order to hold the defendant liable on the ground that the conductor was negligent in allowing the starting signal to be given by a person not an employee, for the plaintiff to show that starting signals habitually had been so given. *Frink v. Boston Elevated Railway*, 121.

In an action for deceit, where, if the testimony of the plaintiff in direct examination was believed, the plaintiff had a right of recovery, and his statements in cross-examination conflict with those in his direct examination, the case is for the jury. *Kerr v. Shurtleff*, 167.

The right of a jury to disbelieve a defendant's denial of the existence of a fact essential to the plaintiff's case does not furnish the plaintiff with evidence of that fact. *Conley v. United Drug Co.* 238.

In an action for personal injuries resulting from an explosion caused by the bursting of a cylindrical steel tank filled with carbonic acid gas, proof of the fact, that the explosion occurred in the basement of a building owned and, with the exception of the first floor, occupied by the defendant as a factory, was held not to be evidence for the jury of the defendant's liability, because

there was nothing to show that at the time of the explosion the tank was in the defendant's custody or control. *Conley v. United Drug Co.* 238.

In an action by a judgment creditor against one of three who were the judgment debtors, if the plaintiff alleges in the writ and declaration that he brings the action for the benefit of another person, who was an assignee of the judgment, and the defendant alleges and introduces evidence tending to show that one of the judgment debtors other than the defendant had paid for and was the real owner of the judgment, the assignee being merely the nominal owner, the burden is upon the plaintiff to prove, not only that the defendant owed the amount of the judgment, but also that the assignment to the person for whose benefit the action was brought was valid, and that the amount of the judgment was due to him. *Flynn v. Howard*, 245.

In an action for personal injuries caused by an automobile of the defendant, where it appears that the defendant was not in the automobile at the time of the accident, the mere facts, that the defendant owned the car and that it was being driven by a chauffeur who was hired by him, do not warrant a finding that at the time of the accident the chauffeur was acting within the scope of his employment by the defendant. *Hartnett v. Gryzmish*, 258.

Upon an agreed statement of facts, in which it is stated that a certain person disappeared in 1818 and never was heard of again although diligent inquiries were made, this court under St. 1913, c. 716, § 5, may draw the inference that he was dead in 1825 and consequently had died before February 14, 1831, when the six year period of limitation on his right to sue for a certain dividend expired. *Boston & Roxbury Mill Corp. v. Tyndale*, 425.

Certain instructions in the charge of the judge presiding at the trial of an indictment for larceny by false pretenses, relating to the burden of proof and the drawing of inferences, which, it was held, when taken in connection with the charge as a whole, were not too broad and were accurate as applied to the evidence and the issues. *Commonwealth v. Farmer*, 507.

In a proceeding *in rem* under R. L. c. 100, § 48, for the forfeiture of certain intoxicating liquors, the allegations of the complaint must be proved as in other criminal cases beyond a reasonable doubt. *Commonwealth v. Intoxicating Liquors*, 602.

Probative Force.

Where the only eyewitness of an accident resulting in death, on his direct, on his cross and on his redirect examination, makes contradictory statements in attempting to describe the circumstances attending the accident, it is for the jury to weigh his conflicting testimony and decide what the facts were. *Kane v. Boston Elevated Railway*, 101.

Certain conflicting statements of a plaintiff on direct and cross-examination were held to raise for the jury the question, which statements were to be believed. *Kerr v. Shurtleff*, 167.

The right of a jury to disbelieve a defendant's denial of the existence of a fact essential to the plaintiff's case does not furnish the plaintiff with evidence of that fact. *Conley v. United Drug Co.* 238.

At the trial of an action against a street railway company for personal injuries alleged to have been caused when the plaintiff's raincoat caught in the front door of the vestibule of a closed car of the defendant as he was alight-

Evidence (continued).

ing from the car when it was in motion, so that he was dragged by the car and run over, the plaintiff testified in substance that he ran beside the car before he fell about one hundred feet, shouting continuously, but no person testified that he had heard the continuous shouting and it was held that there was no evidence to warrant a finding that the motorman heard or ought to have heard the shouting. *Hooper v. Bay State Street Railway*, 251.

Matters of Common Knowledge.

It is a matter of common knowledge, of which the court takes judicial cognizance, that ice is a hard, brittle and slippery substance, and that a cake of it when being carried is likely to fall and break unless handled carefully. *O'Neil v. Toomey*, 242.

Admissions and Confessions.

In an action for personal injuries from being knocked down by an automobile of the defendant negligently driven by the defendant's chauffeur, where there was evidence that the chauffeur, after the happening of the accident, had told the defendant "the whole story, just the way it was," as to his using, for the purpose of obliging a friend of his own, an indirect route to reach a destination appointed for him by the defendant, and that the defendant said that he had a right to do so, it was held, that such evidence might be found to have been an admission by the defendant that, as between him and the chauffeur, the chauffeur was acting within the scope of his employment. *McKeever v. Ratcliffe*, 17.

Where at the trial of an action of contract the defendant, called as a witness by the plaintiff, in response to certain questions as to an interview, a statement of which he said he had dictated afterwards, testifies that it was as the plaintiff's counsel read from a paper in his hand, and neither he nor his counsel then asked to see the paper, the defendant's counsel, before calling the defendant as a witness in his own behalf, is not entitled to have the paper produced for him. *Hutchinson v. Plant*, 148.

Upon the trial of an issue of fact, an admission by one of the parties of a certain material fact does not deprive the other party of his right to prove that fact by affirmative evidence. *Thomson v. Carruth*, 524.

Inferences: Circumstantial Evidence.

Upon an agreed statement of facts, in which it is stated that a certain person disappeared in 1818 and never was heard of again although diligent inquiries were made, this court under St. 1913, c. 716, § 5, may draw the inference that he was dead in 1825 and consequently had died before February 14, 1831, when the six year period of limitation on his right to sue for a certain dividend expired. *Boston & Roxbury Mill Corp. v. Tyndale*, 425.

Certain instructions in the charge of the judge presiding at the trial of an indictment for larceny by false pretenses, relating to the burden of proof and the drawing of inferences, which, it was held, when taken in connection with the charge as a whole, were not too broad and were accurate as applied to the evidence and the issues. *Commonwealth v. Farmer*, 507.

Negative Testimony.

Testimony, that a woman, who was crossing a street railway track from behind a street car from which she just had alighted, having in mind a rule of the company which operated cars on the tracks requiring that a gong should be sounded by the motorman of a car passing a stationary car, stopped and listened and heard no gong, will warrant a finding that no gong was sounded by a car which approached rapidly on the track that she was crossing and struck her. *Emery v. Boston Elevated Railway*, 255.

Opinion: Experts.

At the trial of an indictment under R. L. c. 209, § 1, for forging alterations in a public record, the exclusion of evidence offered by the defendant consisting of excerpts from a book entitled "Forgeries and False Entries" written by one who had testified for the Commonwealth as an expert in handwriting, was held to have been proper, it not appearing that they had any tendency to contradict or control the testimony of the government witness. *Commonwealth v. Segee*, 501.

Competency.

In a suit in equity, at a hearing before a master for the assessment of damages for the failure of a lessee to erect a certain building on the leased premises as he had agreed to do by an agreement in writing collateral to the lease, upon the question of determining the reasonable cost of erecting such a building, it is proper for the master to exclude evidence offered by the defendant to show that before the time when the building was required to be completed the defendant received a bid in writing from a responsible person, which he did not accept, to erect the required building for a sum named, the master having found that the bid offered in evidence was based on a plan and specifications that contained errors and omissions. *Wentworth v. Manhattan Market Co.* 91.

Evidence in an action for deceit for false representations by the defendant, the general agent for a college, as to the authority of the college to grant a certain degree, which was held to be admissible on the question, whether when the defendant made the statement, he knew or should have known that it was false. *Kerr v. Shurtleff*, 167.

In an action upon a judgment, in support of a defense alleged in the answer that the action was really brought on behalf of one of the judgment debtors who had purchased the judgment, the plaintiff was held entitled to introduce in evidence a final decree dismissing after a hearing a suit in equity brought to enjoin the action upon the same ground, the parties being the same. *Flynn v. Howard*, 245.

In an action against a corporation operating an elevated railway for personal injuries sustained by the plaintiff by being pushed from the platform of a car on a train of the defendant at a crowded elevated station, the plaintiff, for the purpose of showing that the defendant had reason to anticipate trouble from the crowded condition of the platform, should be allowed to show what had occurred on previous occasions under the same conditions that obtained at the time the accident happened, although it did not occur at the same hour of the day. *O'Day v. Boston Elevated Railway*, 515.

Relevancy and Materiality.

Where at the trial of a civil case the plaintiff's counsel in his opening statement to the jury refers to an alleged admission made by the defendant, and, this statement being wholly unsupported by any evidence, the judge instructs the jury that it is to be disregarded, the defendant is not entitled as a matter of right to introduce evidence to contradict the counsel's unsupported statement, and the presiding judge in his discretion properly may refuse to permit him to do so. *Hutchinson v. Plant*, 148.

Where, in an action of contract, the personal relations of the parties were material, the defendant was allowed to testify in direct examination in contradiction of testimony previously given by the plaintiff when called as a witness by the defendant, the subject matter of the question being material. *Revel v. Vein*, 297.

Whether if the subject matter had been immaterial, the testimony might have been admitted by the judge in the exercise of his discretion, was not decided. *Ibid.*

In a petition in the Land Court, where a material question is, whether, at the time when an attachment of the land on mesne process was made, the creditor knew that the debtor already had conveyed the land to another by a deed which was not recorded, evidence is admissible as to conversations with and conduct on the part of the creditor before the attachment, tending to show such knowledge on his part, but evidence of statements made by the creditor or his attorney after the attachment are irrelevant and inadmissible. *Hughes v. Williams*, 448.

Extrinsic affecting Writings.

A certain order for printed blanks, which contained no promise to pay but ended with the words "Ordered by," followed by the defendant's name, it was held, might be found not to contain the entire contract as to the transaction described therein, so that a verbal arrangement that the goods were not to be paid for by the person signing the order might be shown in evidence and be given its full effect. *Lyman B. Brooks Co. v. Wilson*, 205.

Provisions of a lease of real estate that at the end of the term the premises should be delivered up in as good order and condition "as the same now are," were held to refer to the condition at the date of the lease and not at the time when it was executed five months later, and not to be ambiguous or open to variation by extrinsic evidence. *Cawley v. Jean*, 263.

In a contract in writing, by which G purchased from T the controlling interest in a certain corporation, the stipulation, "G agrees that so long as he and T are stockholders in said corporation T shall continue in the employ of the corporation," cannot be varied or amplified by oral evidence in regard to matters which were agreed upon in the negotiations that resulted in the contract. *Goldenberg v. Taglino*, 357.

In an action by a holder in due course of a negotiable promissory note indorsed by the payee in blank, against such payee as indorser, it is no defense that "before and at the time of the indorsement, it was agreed, orally, that said indorsement was to be without recourse to him." *Aronson v. Nurenberg*, 376.

In an action for personal injuries against one of two joint tortfeasors, where

there was in evidence an instrument which on its face was a covenant by the plaintiff not to sue the co-tortfeasor, it was held that further evidence offered by the defendant tending to show that negotiations which occurred between the plaintiff and the co-tortfeasor previous to the execution of the covenant were for the purpose of a settlement and discharge of the claim for damages alleged in the declaration should have been admitted, because the defendant, not being a party to the instrument in writing, had a right to show by oral evidence that it did not express the terms of the actual compromise. *Johnson v. Von Scholley*, 454.

Public Records.

The provision of R. L. c. 175, § 74, that copies of official records of departments of the Commonwealth or of any city or town authenticated by the attestation of the officer who has charge of them "shall be competent evidence in all cases equally with the originals thereof," does not render the originals themselves incompetent as evidence. *Commonwealth v. Segee*, 501.

Entries in Books of Account or Card Systems.

Since St. 1913, c. 288, relating to the admission in evidence of certain entries in book accounts, a judge hearing an action for goods sold which the defendant denied he had ordered, properly may admit in evidence, after he has made the necessary findings as to the good faith and time of the entry, an entry in the plaintiff's book of account in which he had charged the goods to the defendant. *Lyman B. Brooks Co. v. Wilson*, 205.

Production of Papers.

Where at the trial of an action of contract the defendant, called as a witness by the plaintiff, in response to certain questions as to an interview, a statement of which he said he had dictated afterwards, testifies that it was as the plaintiff's counsel read from a paper in his hand, and neither he nor his counsel then asked to see the paper, the defendant's counsel, before calling the defendant as a witness in his own behalf, is not entitled to have the paper produced for him. *Hutchinson v. Plant*, 148.

Pleadings as Evidence.

Certain language used by a judge in his charge to a jury in an action by an employee for personal injuries against four persons, alleged to be copartners doing business under a certain firm name, which was held to have been erroneous because the jury naturally would assume from it that the description in the writ was some evidence that the defendants were copartners, whereas, if the judge chose to mention the description in the writ, he should have instructed the jury plainly that it was not evidence at all. *Ibanez v. Winston*, 469.

Of Assignment.

In an action by a judgment creditor against one of three who were the judgment debtors, if the plaintiff alleges in the writ and declaration that he

Evidence (continued).

brings the action for the benefit of another person, who was an assignee of the judgment, and the defendant alleges and introduces evidence tending to show that one of the judgment debtors other than the defendant had paid for and was the real owner of the judgment, the assignee being merely the nominal owner, evidence as to the amount, nature, time and place of payment of the consideration of the assignment is admissible. *Flynn v. Howard*, 245.

Bankrupt's Schedule.

Admission in evidence, at the trial of an action by a trustee in bankruptcy to recover the amount of an alleged unlawful preference, of the bankrupt's schedule of his debts and assets filed in the bankruptcy proceedings after the bankrupt had testified that his financial condition did not change materially from the time he made the payment alleged to be a preference to the time he filed the schedule, which it was held was merely a formal error and could not have affected injuriously the substantial rights of the parties within the meaning of St. 1913, c. 716, § 1. *Batchelder v. Home National Bank of Milford*, 420.

Of Death.

Upon an agreed statement of facts, in which it is stated that a certain person disappeared in 1818 and never was heard of again although diligent inquiries were made, this court under St. 1913, c. 716, § 5, may draw the inference that he was dead in 1825 and consequently had died before February 14, 1831, when the six year period of limitation on his right to sue for a certain dividend expired. *Boston & Roxbury Mill Corp. v. Tyndale*, 425.

Of Failure to sound Gong.

Testimony, that a woman, who was crossing a street railway track from behind a street car from which she just had alighted, having in mind a rule of the company which operated cars on the tracks requiring that a gong should be sounded by the motorman of a car passing a stationary car, stopped and listened and heard no gong, will warrant a finding that no gong was sounded by a car which approached rapidly on the track that she was crossing and struck her. *Emery v. Boston Elevated Railway*, 255.

Of Shouting.

At the trial of an action against a street railway company for personal injuries alleged to have been caused when the plaintiff's raincoat caught in the front door of the vestibule of a closed car of the defendant as he was alighting from the car when it was in motion, so that he was dragged by the car and run over, the plaintiff testified in substance that he ran beside the car before he fell about one hundred feet, shouting continuously, but no person testified that he had heard the continuous shouting and it was held that there was no evidence to warrant a finding that the motorman heard or ought to have heard the shouting. *Hooper v. Bay State Street Railway*, 251.

Foreign Law.

Upon a petition under R. L. c. 193, § 22, for a writ of review after final judgment for the defendant in an action at law to enable the petitioner to show that by the law of another State which governed the rights of the parties the petitioner was entitled to recover, an affidavit of a notary public and counsellor at law, who is not called as a witness, giving his opinion as to the law of such other State, is not admissible in evidence, the respondent having had no opportunity to cross-examine the affiant. *Browne v. Fairhall*, 495.

Of Handwriting.

At the trial of an indictment under R. L. c. 209, § 1, for forging a public record where it is material to show that alterations made in the valuation lists of the assessors of a town were in the handwriting of the defendant, it is proper for the presiding judge to admit in evidence as a standard of comparison a deed, to which the defendant was not a party, which is shown to have been written by him. *Commonwealth v. Segee*, 501.

At such trial the exclusion of evidence offered by the defendant consisting of excerpts from a book entitled "Forgeries and False Entries" written by one who had testified for the Commonwealth as an expert in handwriting, was held to have been proper, it not having appeared that they had any tendency to contradict or control the testimony of the government witness. *Ibid.*

Of Intent.

Evidence of intent which was held to have been admissible at the trial of an indictment under R. L. c. 209, § 1, for forging a public record with intent to injure or defraud by making alterations in the valuation lists of the assessors of a town, where it appeared that the defendant was a member and chairman of the board of assessors. *Commonwealth v. Segee*, 501.

Certain evidence, at the trial of an indictment for larceny by false pretenses whereby a certain woman was induced to pay large sums of money for sets of books of little value by representations of the defendant that he could sell one of the sets for a large sum of money named and that a certain man had agreed to pay that sum, tending to show that the defendant had made to two other persons certain false representations of a kindred nature two years before his relations with the complaining witness, was held to have been admitted properly, being limited strictly by proper instructions of the presiding judge to the issue of the defendant's intent. *Commonwealth v. Farmer*, 507.

At the trial, upon an appeal from a decree of the Probate Court allowing a will, of the issue, "Was the alleged will now offered for probate executed according to law?" the executor may introduce evidence in addition to proof of signature, for the purpose of showing that the alleged testator signed the instrument *animo testandi*, to the effect that immediately after the signing of the instrument on the margin of the fifth page an indorsement was made on a former will stating that it was cancelled. *Thomson v. Carruth*, 524.

Evidence (continued).

To show Knowledge by Attaching Creditor of Defective Title of Debtor.

In order to prove that a creditor, who in an action for the collection of his debt caused an attachment of land standing in the name of his debtor to be made, had knowledge of the fact that the debtor before the attachment had delivered a deed of the premises to another, it is not necessary to prove positive knowledge on his part, but intelligible information of the fact, conveyed to him either orally or in writing from a source which ought to be heeded, is evidence upon which such knowledge can be found. *Hughes v. Williams*, 448.

And, while at the trial of such an issue evidence is admissible as to conversations with and conduct on the part of the creditor before the attachment, tending to show such knowledge on his part, evidence of statements made by the creditor or his attorney after the attachment are irrelevant and inadmissible. *Ibid.*

Of Motive.

Evidence of motive which was held to have been admissible, at the trial of an indictment under R. L. c. 209, § 1, for forging a public record with intent to injure or defraud by making alterations in the valuation lists of the assessors of a town, where it appeared that the defendant was a member and chairman of the board of assessors. *Commonwealth v. Segoe*, 501.

Of Partnership.

Certain language used by a judge in his charge to a jury in an action by an employee for personal injuries against four persons, alleged to be copartners doing business under a certain firm name, which was held to have been erroneous because the jury naturally would assume from it that the description in the writ was some evidence that the defendants were copartners, whereas, if the judge chose to mention the description in the writ, he should have instructed the jury plainly that it was not evidence at all. *Ibanez v. Winston*, 469.

Of State of Mind.

In an action for personal injuries caused by an automobile of the defendant, where a question at issue is whether a chauffeur, who was hired by the defendant and was driving his automobile at the time of the accident, was at that time acting within the scope of his employment and where it appears that at the time of the accident the chauffeur was returning from his home, it was held under the circumstances to have been proper at the trial to exclude a question, asked of the chauffeur by the plaintiff, as to whether he was willing that the defendant should have known that he took out the car in order to go to his noon meal. *Hartnett v. Gryzmish*, 258.

What evidence is necessary to show knowledge by an attaching creditor of a defect in the debtor's title of the property attached. *Hughes v. Williams*, 448.

Violation of Rule as Evidence of Negligence.

In an action by a woman against a corporation operating an elevated railway for personal injuries sustained by the plaintiff by being pushed from

the platform of a car on a train of the defendant, if it can be found that the plaintiff was carried off her feet because of the conflict between incoming and outgoing passengers at a crowded elevated station of the defendant, who were acting contrary to a rule of the defendant which the defendant's servants made no attempt to enforce, there is evidence for the jury of the defendant's negligence. *O'Day v. Boston Elevated Railway*, 515.

Conflicting Statements of Witness.

Where the only eyewitness of an accident resulting in death, on his direct, on his cross and on his redirect examination, makes contradictory statements in attempting to describe the circumstances attending the accident, it is for the jury to weigh his conflicting testimony and decide what the facts were. *Kane v. Boston Elevated Railway*, 101.

Certain conflicting statements of a plaintiff on direct and cross-examination were held to raise for the jury the question, which statements were to be believed. *Kerr v. Shurtleff*, 167.

In an action against a street railway company for personal injuries alleged to have been caused by negligence of a motorman in not stopping a closed car of the defendant from which the plaintiff was alighting while it was in motion when a raincoat which the plaintiff was wearing caught in the door of the vestibule, upon contradictory statements of a witness as to the distance the car went after he told the motorman of the plaintiff's plight, it was held that the jury were warranted in finding that after the witness spoke to the motorman the car continued for one hundred and seventy-five feet, and that the motorman was negligent. *Hooper v. Bay State Street Railway*, 251.

Contradicting one's own Witness.

Where a conductor of a street railway company, called to testify for the plaintiff in an action for personal injuries, is asked whether he had made any report about a certain car and answers that he does not remember, the plaintiff cannot introduce in evidence under R. L. c. 175, § 24, for the purpose of contradicting him, evidence tending to show that he had made such a report, or that on a previous occasion he had stated that he had done so. *Corsick v. Boston Elevated Railway*, 144.

EXCEPTIONS.

In actions at law, see PRACTICE, CIVIL, *Exceptions*.

In suits in equity, see EQUITY PLEADING AND PRACTICE, *Exceptions*.

In criminal procedure, see PRACTICE, CRIMINAL, *Exceptions*.

EXECUTION.

Suit in equity to redeem certain "wild and uncultivated land" from an execution sale. *Young v. Reynolds*, 129.

EXECUTOR AND ADMINISTRATOR.

Under R. L. c. 202, § 10, if a person entitled to bring an action dies within the period fixed by the statute of limitations, the action, if it survives, may

Executor and Administrator (*continued*).

be brought by the administrator of his estate within two years after the administrator's giving bond for the discharge of his trust, although such administrator was not appointed until eighty-four years after the expiration of the original period of limitation. *Boston & Roxbury Mill Corp. v. Tyndale*, 425.

In a certain suit in equity by a trustee under a will for instructions, it was held that, as to a fund in the hands of the trustee which should be distributed in accordance with the residuary clause of the will, the executor's accounts being fully settled, it was not necessary that an administrator *de bonis non* be appointed, but that the trustee should make the distribution. *State Street Trust Co. v. Morris*, 429.

FALSE ENTRIES.

FORGING PUBLIC RECORD, see that title.

FALSE PRETENSES.

See LARCENY.

FORFEITURE.

Criminal proceeding *in rem* under R. L. c. 100, § 48, for the forfeiture of certain intoxicating liquors. *Commonwealth v. Intoxicating Liquors*, 602.

FORGERY.

FORGING PUBLIC RECORD, see that title.

FORGING PUBLIC RECORD.

The valuation lists of the assessors of a town are "public records" within the meaning of R. L. c. 209, § 1, which makes it a crime to forge a public record with intent to injure or defraud. *Commonwealth v. Segee*, 501.

The fraudulent alteration of the valuation lists of the assessors of a town is none the less the forging of a public record with intent to defraud under R. L. c. 209, § 1, if at the time of such alteration the lists, although they had been delivered to the collector of taxes, were not accompanied by a warrant for the collection of the taxes therein assessed. *Ibid.*

In order to constitute the crime of forging a public record with intent to injure or defraud, it is not necessary that the whole instrument should be fictitious. *Ibid.*

Such forgery may consist in the material alteration of a part of a valid document, as in the present case it consisted in changes in the valuation lists of the assessors of a town. *Ibid.*

Upon an indictment for such forging of a public record "with intent to injure or defraud" it is not necessary, in order to convict the defendant, to show an intent to defraud a particular person. It is sufficient to prove a general intent to defraud some one. *Ibid.*

At the trial of an indictment under R. L. c. 209, § 1, for forging alterations

in a public record, the exclusion of evidence offered by the defendant consisting of excerpts from a book entitled "Forgeries and False Entries" written by one who had testified for the Commonwealth as an expert in handwriting, was held to have been proper, it not having appeared that they had any tendency to contradict or control the testimony of the government witness. *Commonwealth v. Segee*, 501.

At the trial of such an indictment, where it appears that the defendant was a member and the chairman of the board of assessors, evidence is competent and material which shows that the defendant made the alterations with an intent to cheat and defraud and not for the purpose of correcting errors. *Ibid*.

At such a trial, evidence also is competent, as tending to show a motive to commit the crime, that intimate relations of friendship existed between the defendant and certain persons whose property had been assessed and that the alterations had been made to enable those persons to escape the payment of taxes that had been assessed to them lawfully. *Ibid*.

At such trial, where it is material to show that alterations made in the valuation lists of the assessors of a town were in the handwriting of the defendant, it is proper for the presiding judge to admit in evidence as a standard of comparison a deed, to which the defendant was not a party, which is shown to have been written by him. *Ibid*.

FRATERNAL BENEFICIARY CORPORATION.

A hearing before the executive board of a fraternal beneficiary corporation, upon a complaint made to the Supreme Lodge that a reinstatement of a certain member by a subordinate lodge was contrary to the constitution and by-laws of the corporation, is *quasi* judicial in character and ought to be conducted in a spirit of impartiality, and a reasonable opportunity ought to be given to the subordinate lodge to learn the nature of the charges preferred and to present evidence and arguments in reply. *Correia v. Portuguese Fraternity*, 305.

On a petition for a writ of mandamus to compel the Supreme Lodge of a fraternal beneficiary corporation to reinstate a subordinate lodge of which the petitioners were members, it was held on the facts that the petition was brought prematurely by reason of the failure of the petitioners first to resort to an appeal to the Supreme Lodge, the facts not disclosing that this mode of relief furnished by the constitution and by-laws of the order would be an idle ceremony. *Ibid*.

FRAUD.

One who received an assignment of a policy of life insurance from the insured without the policy itself, which by reason of fraud of an agent of the insured was not delivered to him, may maintain a suit in equity for possession of the policy against a person to whom it has been delivered by the agent without right and who secretes it so that it cannot be reached in an action at law. *Herman v. Connecticut Mutual Life Ins. Co.* 181.

In a suit in equity by the first assignee of a policy of life insurance against a second assignee to gain possession of the policy, it was held that, under the circumstances, the first assignee by his voluntary action in leaving the policy in the possession of the agent for the insured who, in behalf of the insured

Fraud (continued).

and in fraud of the first assignee, had pledged it to the second assignee, was estopped to deny the validity of its delivery to the second assignee, and could have possession of it only upon paying to the second assignee the amount of his note with interest and costs of suit. *Herman v. Connecticut Mutual Life Ins. Co.* 181.

In the same suit it was held that the second assignee had no right to hold the policy as security for a second note upon which, after it was signed, he had written without authority of the insured a statement that the same policy was to be held as security for it. *Ibid.*

Suits in equity to relieve from results of fraud, see appropriate subtitle under EQUITY JURISDICTION.

See also DECEIT.

FRAUDS, STATUTE OF.

An oral promise, made to a contractor for the mason work of certain houses by the mortgagee under a construction mortgage upon the property, that, if the contractor will go on with his work under his contract with the builder, the mortgagee will pay him the amounts that become due to him under this contract, is a promise to answer for the debt of another under R. L. c. 74, § 1, cl. 2. *Ribock v. Canner*, 5.

In an action upon such a promise, it does not help the plaintiff to prove that there was a valuable consideration for the defendant's promise or to show that the defendant made payments from time to time in part performance of his oral promise. *Ibid.*

Where a real estate broker, who has been employed by a landowner to sell the land on certain terms, reports to his principal by telephone that a purchaser who will agree to those terms has been found, whereupon the principal says "It is all right; go ahead," this does not give the broker authority to make a contract in writing on those terms in the principal's behalf which will bind him under the statute of frauds. *Record v. Littlefield*, 483.

If a real estate broker, in consideration of certain information imparted to him by another real estate broker, agrees that if he earns a commission by reason of the information he will give the informing broker one half of it, this is a contract that can be performed within a year and is not within the statute of frauds, R. L. c. 74, § 1, cl. 5. *Collins v. Snow*, 542.

And, if the contract with the customer under which the commission is earned provides for the payment of the commission in instalments to be paid in successive years, this does not change the character of the original contract between the two brokers. *Ibid.*

HAWKERS AND PEDLERS.

St. 1907, c. 584, § 9, providing that "the police commissioner of the city of Boston may designate from time to time certain streets, or parts of streets, or sections of the city wherein, and not elsewhere in the city, it shall be lawful on the days and within the hours specified by him, and under such general rules as he shall make, for any hawker or pedler, without the license provided for in this act, to stop or stand for the purpose of selling merchandise," is constitutional, and a regulation made by such commissioner in pursuance thereof is valid. *Commonwealth v. Fox*, 498.

In the foregoing statute, the words "and not elsewhere in the city" do not demand an unqualified utter prohibition of the business of hawking and peddling in some sections, but that the statute merely provides for prohibition in the streets and sections designated during defined hours on certain days and for regulation in all other parts of the city. *Commonwealth v. Fox*, 498.

HIGHWAY.

See *WAY, Public*.

HUSBAND AND WIFE.

Under R. L. c. 152, § 35, a divorce obtained by an inhabitant of this Commonwealth in another State, into which he went for the purpose, "for a cause which occurred, if at all, in this Commonwealth while the parties resided here," can have no force or effect in this Commonwealth. *Maloof v. Abdallah*, 21.

Consequently such a divorce has no effect to end the liability of a husband obtaining it for the separate support of his wife ordered by the Probate Court under R. L. c. 153, § 33. *Ibid*.

Construction of a bond given to dissolve an attachment in a proceeding in the Probate Court on a petition of a wife for separate support, where there can be no final judgment for the petitioner, the bond being conditioned upon the payment of whatever final judgment shall be entered. *Ibid*.

Damages for a breach of such a bond. *Ibid*.

In fixing the amount for which execution should issue on a judgment for the penal amount of such a bond, the state of affairs at the time of the hearing must be considered. *Ibid*.

In such case the husband, as principal on the bond, is liable for the full amount of the sums ordered to be paid by him, less what he has paid already and not exceeding the penalty of the bond with interest, and a surety is liable for the same amount. *Ibid*.

No action can be maintained by a third person against a husband for the value of necessities furnished to his wife who is living apart from him by mutual consent, if, before the necessities were furnished, the Probate Court, on a petition by the wife under R. L. c. 153, § 33, had ordered the husband to pay a certain sum to the wife periodically for her support and that order remained in force and was complied with by the husband. *Malden Hospital v. Murdock*, 73.

The filing in the Probate Court in behalf of a surviving husband of a certain writing withdrawing all objection to proof of the instrument presented was held not to deprive such husband of his right under R. L. c. 135, § 16, to file in the registry of probate a writing waiving the provisions made for him in the will and claiming such portion of his wife's estate as he would have taken if she had died intestate. *McGrath v. Quinn*, 27.

After filing such a waiver and claim, the husband may maintain a petition in the Probate Court under R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256, for an order to sell so much of the real estate that belonged to his deceased wife as may be necessary to provide the amount to which he is entitled. *Ibid*.

Husband and Wife (continued).

In the present case it appeared that the counsel for the surviving husband, when he filed the writing withdrawing objection to the proof of the will, stated to the counsel for the executor that after the proving of the will the surviving husband intended to exercise his right to waive its provisions.

McGrath v. Quinn, 27.

Where in a suit in equity to compel the specific performance of a contract in writing, alleged to have been signed in behalf of the defendant, to convey certain land to the plaintiff, who was a married woman, it appeared that the contract provided for a sale and conveyance to the plaintiff's husband, and where throughout the trial of the case the plaintiff was recognized by the defendant as being the assignee of the contract, she was treated by this court as having the same rights under the contract that her husband had. *Record v. Littlefield*, 483.

ICE.

It is a matter of common knowledge, of which the court takes judicial cognizance, that ice is a hard, brittle and slippery substance, and that a cake of it when being carried is likely to fall and break unless handled carefully.

O'Neil v. Toomey, 242.

Where it appears in evidence that a cake of ice, when being carried by a retail dealer with ice tongs over his shoulder through the doorway of a kitchen for delivery to a customer, fell to the floor and injured the customer, and where the cause of the fall is not explained, a jury can find that the accident would not have occurred without fault on the part of the defendant and may infer negligence from its happening. *Ibid*.

INDUSTRIAL ACCIDENT BOARD.

See **WORKMEN'S COMPENSATION ACT.**

INSURANCE.*Life.*

A policy of life insurance is a non-negotiable chose in action, and, if by his own voluntary action the insured or one to whom the insured has assigned his rights so clothes a third person with the *indicia* of ownership as to justify others in regarding him either as the rightful owner or as having authority from that owner to transfer the policy, the owner or a rightful assignee is estopped to set up his title against a *bona fide* purchaser for value from such third person. *Herman v. Connecticut Mutual Life Ins. Co.* 181.

An assignment of a policy of life insurance by the insured is valid as between him and the assignee, although the policy is not delivered to the assignee and although a provision of the policy, that no assignment of it "shall be valid unless made in writing, and a duplicate or certified copy thereof be filed at the office of said company," is not complied with. *Ibid*.

One who received an assignment of a policy of life insurance from the insured without the policy itself, which by reason of fraud of an agent of the insured was not delivered to him, may maintain a suit in equity for possession of the policy against a person to whom it has been delivered by the agent

without right and who secretes it so that it cannot be reached in an action at law. *Herman v. Connecticut Mutual Life Ins. Co.* 181.

In a suit in equity by the first assignee of a policy of life insurance against a second assignee to gain possession of the policy, it was held that, under the circumstances, the first assignee by his voluntary action in leaving the policy in the possession of the agent for the insured who, in behalf of the insured and in fraud of the first assignee, had pledged it to the second assignee, was estopped to deny the validity of its delivery to the second assignee, and could have possession of it only upon paying to the second assignee the amount of his note with interest and costs of suit. *Ibid.*

In the same suit it was held that the second assignee had no right to hold the policy as security for a second note upon which, after it was signed, he had written without authority of the insured a statement that the same policy was to be held as security for it. *Ibid.*

Against Liability.

Under a provision, contained in a policy of insurance against loss from liability imposed by law upon the insured for damages on account of bodily injuries, that no action shall lie against the insurer for any loss under the policy unless it is paid by the insured in satisfaction of a judgment, "nor unless such action is brought within ninety days after such judgment, by a court of last resort," the payment of a judgment of the Superior Court, which under R. L. c. 157, § 3, has exclusive original jurisdiction of such an action, satisfies the requirement. *Tighe v. Maryland Casualty Co.* 463.

Under a provision in the same policy that the loss shall not be recovered unless paid by the insured in satisfaction of a judgment "after trial of the issue," it is no defense to an action on the policy that the judgment paid by the plaintiff was obtained by default without a trial, if the plaintiff gave adequate and seasonable notice of the action to the insurer and the insurer appeared and filed an answer and afterwards declined to defend the action. *Ibid.*

INTENT.

Evidence of, see appropriate subtitle under EVIDENCE.

INTEREST.

In an action on a bond, where a breach of the bond before the bringing of the action has been shown and the amount to which the plaintiff is entitled exceeds the penalty of the bond, execution should be ordered to issue for the amount of the penalty of the bond with interest from the date of the writ. *Maloof v. Abdallah*, 21.

In a suit in equity under R. L. c. 178, § 33, to redeem certain land from an execution sale, the defendant is entitled to be credited, in the computation of the sum which the plaintiff must pay in order to redeem, with interest on sums paid by him for taxes while in possession of the land and reasonable expenses incurred for repairs and improvements. *Young v. Reynolds*, 129.

INTERSTATE COMMERCE.

In determining whether a commercial or trading business is interstate, it is not of decisive consequence where the contracts are made or where the title passes. *Marconi Wireless Telegraph Co. v. Commonwealth*, 558.

The constitutionality of the excise imposed by St. 1909, c. 490, Part III, § 56, on certain foreign business corporations having usual places of business in this Commonwealth was referred to as already established and was reaffirmed. *Ibid.*

The foregoing statute does not apply to a foreign corporation having its place of business here only for use in interstate commerce, and there is no distinction in this regard between a corporation doing a commercial or trading business and one engaged in the business of transportation. *Ibid.*

INTOXICATING LIQUORS.

A criminal proceeding *in rem* under R. L. c. 100, § 48, for the forfeiture of certain intoxicating liquors alleged to have been brought into a town in which licenses of the first five classes were not granted and to have been intended for sale in violation of law, is not barred by the previous conviction under St. 1906, c. 421, as amended by St. 1910, c. 497, § 2, of the person who transported the liquors for transporting them in the town without having been granted a permit so to do. *Commonwealth v. Intoxicating Liquors*, 602.

In such a proceeding the allegations of the complaint must be proved as in other criminal cases beyond a reasonable doubt. *Ibid.*

Such a proceeding is not barred by a previous proceeding under the same statute, in which the prosecuting officer terminated the case by a discontinuance and an order was made for the return of the liquors followed by their delivery to the claimant. *Ibid.*

INVITED PERSON.

See NEGLIGENCE, *Invited Person*.

IPSWICH.

In a suit in equity by the town of Ipswich against the Proprietors of Jeffries Neck Pasture and a certain grantee from that corporation, to set aside a deed against the authorization of which the plaintiff had not been permitted to vote as the holder of certain undrawn rights in the defendant corporation, conveyed to it in 1788 by the Commoners of Ipswich, it was held that the defendants were not in a position to assert that the plaintiff was estopped by a plea of the Commoners, in an action by another person in 1723, asserting that they had no right in the common land left undisposed of. *Ipswich v. Proprietors of Jeffries Neck Pasture*, 487.

In the same suit it was held that the relation of the defendant corporation to the owners of the undrawn rights, who were the owners in common of the land called the Jeffries Neck Pasture, if not that of a trustee to *cestuis que trust*, was akin to that relation, and that the defendant corporation had not acquired by ouster or adverse possession any title to such undrawn rights

against the plaintiff, and the deed in question accordingly was set aside as not authorized by a vote of two thirds in number of the right owners. *Ipswich v. Proprietors of Jeffries Neck Pasture*, 487.

ITALIAN CATHOLIC CEMETERY ASSOCIATION.

St. 1913, c. 292, confirming and making valid the by-laws of the Italian Catholic Cemetery Association, which had been incorporated in 1905 under R. L. cc. 78, 123, and unauthorized acts of its incorporators in voting to issue and in issuing shares of capital stock and fixing the par value of the stock and the rights of holders thereof, occasioned no breach of contract nor impairment of lawfully vested rights of property, and is constitutional. *Granara v. Italian Catholic Cemetery Association*, 387.

JOINT TORTFEASORS.

Where claims for damages for personal injuries are made upon one of two street railway companies whose joint negligence caused the injuries and such company settles the claims, it has no right of action in tort against the other company to compel it to pay any part of the money it paid in such settlements. *Old Colony Street Railway v. Brockton & Plymouth Street Railway*, 84.

Construction of a contract in writing between two street railway companies relating to the operation of cars of one company upon the tracks and by the servants of the other, from which it was held that the second company had no right to compel the first company to pay to it any part of what it had paid in settlement of claims for personal injuries caused by the combined negligence of the first company in suffering an axle of one of its cars to be out of repair, and of the servants of the second company in running the car at an excessive rate of speed, because the agreement dealt only with damage which was due to the fault of one company without fault on the part of the other. *Ibid.*

Because certain provisions of such a contract, which required a reference of such matter to a referee, had not been complied with, it was held that one company could not maintain an action at law upon the contract to compel the other company to pay any portion of sums paid by it for injuries so caused, because to permit the maintenance of such an action would be to make a new contract for the parties and to substitute the court for the referee selected and agreed upon by them. *Ibid.*

An instrument under seal, delivered to one of two joint tortfeasors in consideration of a sum of money paid by him to the person who suffered from the tort, whereby such person covenanted "to forever refrain from instituting, pressing or in any way aiding any claim, demand, action or causes of action for damages . . . for or on account or in any way growing out of" the tort, does not operate as a release of the injured person's cause of action against the other tortfeasor. *Johnson v. Von Scholley*, 454.

In an action for personal injuries against one of two joint tortfeasors, where there was in evidence an instrument which on its face was a covenant by the plaintiff not to sue the co-tortfeasor, it was held that further evidence offered by the defendant tending to show that negotiations which occurred

Joint Tortfeasors (continued).

between the plaintiff and the co-tortfeasor previous to the execution of the covenant were for the purpose of a settlement and discharge of the claim for damages alleged in the declaration should have been admitted, because the defendant, not being a party to the instrument in writing, had a right to show by oral evidence that it did not express the terms of the actual compromise. *Johnson v. Von Scholley*, 454.

Transactions between the plaintiff in an action for conversion and a person, other than the defendant, who also might have been held liable for the conversion, which were held as a matter of law to constitute a loan to the plaintiff, and not a satisfaction of the claim or a transfer of title to the property from the plaintiff, and to afford no defense to the action. *Rosenberg v. National Dock & Storage Warehouse Co.* 518.

An employer, who has incurred the punishment of paying the amount of a judgment against him for causing the death of an employee, cannot recover the whole or any part of the damages thus paid by him from another person who contributed to the wrongful conduct on which the judgment was founded. *Boott Mills v. Boston & Maine Railroad*, 582.

The exception, to the rule that there can be no contribution between joint tortfeasors, which permits a recovery where the plaintiff acted in good faith and did not participate in the defendant's wrongful conduct, does not apply to an action by a mill corporation against a railroad corporation to recover the amount awarded for conscious suffering in a judgment paid by the plaintiff in an action against him under St. 1909, c. 514, § 128, for alleged negligence that caused conscious suffering of an employee preceding his death, in which damages were awarded for the death as well as for the conscious suffering. *Ibid.*

JUDGMENT.

Construction of a bond given to dissolve an attachment in a proceeding in the Probate Court on a petition of a wife for separate support, where there can be no final judgment for the petitioner, the bond being conditioned upon the payment of whatever final judgment shall be entered. *Maloolf v. Abdallah*, 21.

Damages for a breach of such a bond. *Ibid.*

It is no defense to an action of contract upon an account annexed that the plaintiff's claim previously had been allowed by a referee in bankruptcy in proceedings under the bankruptcy act of 1898 in which no dividend was paid on the bankrupt's estate and the bankrupt was refused a discharge. *Valente v. Cosentino*, 125.

In an action upon a judgment, in support of a defense alleged in the answer that the action was really brought on behalf of one of the judgment debtors who had purchased the judgment, the plaintiff was held entitled to introduce in evidence a final decree dismissing after a hearing a suit in equity brought to enjoin the action upon the same ground, the parties being the same. *Flynn v. Howard*, 245.

A woman who in Maine under a Maine statute had procured a divorce with a decree ordering that the libellee pay to her a certain amount per week till further order of the court, and that in default of any of such payments for the space of two months, an execution was "to issue therefor," and who within a year thereafter had married another, was allowed to maintain an

action of contract here upon an execution for arrears of alimony which had accumulated during four years after the decree. *Taylor v. Stowe*, 248.

A criminal proceeding *in rem* under R. L. c. 100, § 48, for the forfeiture of certain intoxicating liquors alleged to have been brought into a town in which licenses of the first five classes were not granted and to have been intended for sale in violation of law, is not barred by the previous conviction under St. 1906, c. 421, as amended by St. 1910, c. 497, § 2, of the person who transported the liquors for transporting them into the town without having been granted a permit so to do. *Commonwealth v. Intoxicating Liquors*, 602.

Nor is such a proceeding barred by a previous proceeding under the same statute, in which the prosecuting officer terminated the case by a discontinuance and an order was made for the return of the liquors followed by their delivery to the claimant. *Ibid.*

JURISDICTION.

Of Probate Court, see appropriate subtitle under PROBATE COURT.

Of Superior Court, see SUPERIOR COURT.

EQUITY JURISDICTION, see that title.

The United States courts have not exclusive jurisdiction of a suit in equity founded on an alleged breach of a contract in writing to pay a stipulated royalty on the selling price of an appliance patented by the plaintiff and manufactured and sold by the defendant under an exclusive license from the plaintiff. *Potterton v. Condit*, 216.

The omission, in the codification of the railroad and street railway laws in St. 1906, c. 463, of the reference in R. L. c. 112, § 24, to c. 111, § 70, by which the Supreme Judicial Court was given exclusive jurisdiction of all questions arising out of street railway mortgages, is significant of a legislative purpose to change the law; and, since such codification, the court of appropriate jurisdiction of a suit to foreclose a trust mortgage upon the property of a street railway company is to be determined apart from any express statute. *Federal Trust Co. v. Bristol County Street Railway*, 367.

JURY AND JURORS.

Waiver of a right to a trial by jury of questions raised by a plea in abatement. *Young v. Duncan*, 346.

KEEPING ROOM FOR REGISTERING BETS OR BUYING OR SELLING POOLS.

Upon a complaint under R. L. c. 214, § 17, for keeping a room for the purpose of registering bets or of buying or selling pools, the offense is made out if the room is shown to have been kept for either of these unlawful purposes. *Commonwealth v. Sullivan*, 281.

The keeping of a room for the purpose of selling books for twenty-five cents each, having coupons attached for guessing the winners at certain baseball games, the money received from the sale of the books constituting a pool out of which prizes were paid to the winners in the guessing contest, can be found to be a violation of R. L. c. 214, § 17. *Ibid.*

LABOR UNION.

Suit in equity to enjoin unlawful interference by a labor union with the plaintiff's business, see **EQUITY JURISDICTION**, *To enjoin Unlawful Interference*.

LACHES.

See that subtitle under **EQUITY JURISDICTION**.

LAND COURT.

Appeal.

Under R. L. c. 128, § 13, as amended by St. 1910, c. 560, § 1, a legatee of money under the will of a testator, whose estate is alleged to be involved in proceedings in the Land Court for a registration of the title to a parcel of land, has no interest in the land which can make him a party aggrieved by a decree of the Land Court concerning it and give him a right to claim an appeal. *Waban Rose Conservatories v. Hall*, 533.

LANDLORD AND TENANT.

Contract relating to Erection of Building.

Where in a contract in writing collateral to a lease the lessee has agreed to erect a certain building "in a manner satisfactory to" the lessor and "in a manner to the reasonable satisfaction of the" lessor, these expressions are to be construed to have the same meaning, and to mean that the work is to be done in such a way as reasonably ought to satisfy the lessor. *Wentworth v. Manhattan Market Co.* 91.

Where in a suit in equity seeking to enforce specifically a contract contained in a lease and agreement in writing by which the lessee agreed to erect on the plaintiff's land a building there described, it has been decided by this court that, by reason of the action of the parties caused by their different interpretations of the agreement as to the size and character of the required building, it would be inequitable to enforce the defendant's agreement specifically, and the case is sent to a master for the assessment of damages, the facts that the defendant was right as to the dimensions and character of the required building and that the plaintiff was wrong in asking for a different one, do not absolve the defendant from his liability in damages for his failure to erect any building at all. *Ibid.*

Upon the assessment of damages in such a suit where it appeared that the building was to be completed at a date just before the filing of the bill, and that the lessee had the right to occupy it on payment of a stipulated rent until the termination of the lease eight years later, it was held that the plaintiff was entitled to recover as damages only a sum equal to what would be the present worth of such a building subject to the lease. *Ibid.*

In such a suit in equity, at a hearing before a master for the assessment of damages, it was held that under the circumstances it was proper to exclude evidence offered by the defendant to show that before the time when the

building was required to be completed the defendant received a bid in writing from a responsible person, which he did not accept. *Wentworth v. Manhattan Market Co.* 91.

In the same suit it appeared that the lease and agreement contained a provision that after the day fixed for the completion of the building an increased rent should be paid in monthly instalments, that by a decision of this court the defendant was right as to the kind of building required to be erected, but that he had committed a breach of the agreement by failing to erect a building of any kind, so that it was held that, as a part of the damages, the plaintiff was entitled to recover the increased rent from and after the date of the rescript of this court together with interest at the rate of six per cent per annum on each monthly instalment as it became due in case it remained unpaid. *Ibid.*

Agreement in Lease for Purchase by Lessee.

Indorsement on the back of a lease of real estate and personal property, that contained an agreement of the lessee to purchase the leased property at the end of the term, by reason of which it was held that the lessee, having chosen to limit his remedy for loss by fire to a deduction from the purchase price, could not claim, in case he did not make the purchase, any right to deduct the amount of such loss from the amount due from him as rent under the lease. *Cawley v. Jean*, 263.

Covenants in Lease.

Where a lease of real estate is dated on the first day of the term that it creates, and purports to have been executed on that day, but in fact was executed about five months later after certain changes had been made in the buildings on the premises, and contains a covenant of the lessee to deliver up the premises at the end of the term in "as good order and condition . . . as the same now are," the condition referred to is that at the date of the lease and not that at the time of its execution, and the plain words of the covenant cannot be varied by any extrinsic evidence to the contrary. *Cawley v. Jean*, 263.

Further construction of the same covenant as to changes made with the consent of the lessor after entry by the lessee. *Ibid.*

In an action for a breach of such a covenant, the plaintiff on proving the breach is entitled to recover such a sum of money as at the end of the term would put the premises in the condition in which the tenant was bound to leave them. *Ibid.*

Liability of Landlord to Tenant's Customer.

Owner of a building, who let the entire second floor to a milliner but retained control of a front stairway leading to a landing on the second floor and of the landing itself, on which were doors leading to the milliner's rooms, and also of a rear stairway which was approached from the landing through a closed door and led to the rear of the first floor, was held not to be liable for personal injuries received by a customer of the milliner who fell down the back stairs. *Morong v. Spofford*, 50.

Damage by Fire.

Indorsement on the back of a lease of real estate and personal property, that contained an agreement of the lessee to purchase the leased property at the end of the term, by reason of which it was held that the lessee, having chosen to limit his remedy for loss by fire to a deduction from the purchase price, could not claim, in case he did not make the purchase, any right to deduct the amount of such loss from the amount due from him as rent under the lease. *Cawley v. Jean*, 263.

LAND REGISTRATION.

See LAND COURT.

LARCENY.

The word "steal" as used in an indictment for larceny under the short form set forth in R. L. c. 218 has become a term of art and includes the criminal taking of personal property either by larceny, embezzlement or false pretenses. *Commonwealth v. Farmer*, 507.

Article 12 of the Declaration of Rights requires in an indictment for larceny only such particularity of allegation as may be of service to the defendant in enabling him to understand the charge and prepare for his defense. *Ibid.*

Where, therefore, the statutory form of indictment is used, this right is sufficiently protected by R. L. c. 218, § 39, providing for a bill of particulars in case the defendant desires more specific information as to the crime which he is alleged to have committed. *Ibid.*

There is nothing in the provisions of R. L. c. 218 in regard to the form of an indictment for larceny by false pretenses that violates any right secured by the Fourteenth Amendment or any other provision of the Constitution of the United States. *Ibid.*

On an indictment for larceny by obtaining money from a certain person by false and fraudulent representations, it is not necessary to show, in order to convict the defendant, that the fraudulent representations made by him were the only influence operating upon the mind of the person in question to induce him to give up the money. *Ibid.*

It is enough on such an indictment to show that the fraudulent representations made by the defendant were a decisive influence to that end. *Ibid.*

Certain instructions in the charge of the judge presiding at the trial of an indictment for larceny by false pretenses, relating to the burden of proof and the drawing of inferences, which, it was held, when taken in connection with the charge as a whole, were not too broad and were accurate as applied to the evidence and the issues. *Ibid.*

Certain evidence, at the trial of an indictment for larceny by false pretenses whereby a certain woman was induced to pay large sums of money for sets of books of little value by representations of the defendant that he could sell one of the sets for a large sum of money named and that a certain man had agreed to pay that sum, tending to show that the defendant had made to two other persons certain false representations of a kindred nature two years before his relations with the complaining witness was held to have

been admitted properly, being limited strictly by proper instructions of the presiding judge to the issue of the defendant's intent. *Commonwealth v. Farmer*, 507.

It also was held that, on the evidence at such trial, upon the circumstances shown, the jury were warranted in finding that there was no such customer and no such agreement as the defendant had represented to exist, and that the representations of the defendant were fraudulently false. *Ibid*.

LEGACY.

See DEVISE AND LEGACY.

LIBEL AND SLANDER.

Defamatory words, spoken in a foreign language in the presence of third persons, are not actionable if they are comprehensible only to the person using them and the person accused. *Economopoulos v. A. G. Pollard Co.* 294.

Application of the foregoing rule of law in an action against the proprietor of a department store for slander, in accusing the plaintiff of the crime of larceny, where there was evidence of talk in English by a clerk to the plaintiff, who could understand or talk little if any English, when no one else was within hearing, and of talk by a Greek clerk to the plaintiff in Greek, but no evidence that any one other than the plaintiff and the Greek clerk understood the Greek language. *Ibid*.

LICENSE.

See NEGLIGENCE, *Licenses*.

LIEN.

MECHANIC'S LIEN, see that title.

LIMITATIONS, STATUTE OF.

If a clerk of court neglects to enter a judgment for the plaintiff in an action, in consequence of which the action subsequently is dismissed for want of prosecution, this gives the plaintiff an immediate right of action against the clerk, on which the statute of limitations begins to run from the time when the judgment should have been entered, although the plaintiff's consequent financial loss is not ascertained, or even does not occur, until long afterwards. *McKay v. Coolidge*, 65.

A petition against a town for the assessment of damages resulting from the taking, by means of wells driven for purposes of a water supply, of water which otherwise would have percolated into a river which supplied a mill pond of the petitioner, where no final certificate of taking was filed and recorded as the statute requires, is brought within the two years' period of limitation from the time of the taking provided by the statute, if it is brought within two years from the time of the driving of permanent wells, although,

Limitations, Statute of (continued).

more than two years before it was brought, temporary test wells had been driven by the town. *Spaulding v. Plainville*, 321.

A bill in equity, which was filed in June, 1911, by a private cemetery corporation to remove a cloud upon its title to the cemetery alleged to have been created by a sale in August, 1905, for the collection of a tax assessed illegally in 1902, was held not to have been brought within the six years allowed by R. L. c. 13, § 75, as amended by St. 1905, c. 325, § 3. *Garden Cemetery Corp. v. Baker*, 339.

Whether a stockholder in a corporation cannot maintain an action against the corporation for the amount of a dividend without a previous demand, and therefore the statute of limitations cannot begin to run upon a claim for a dividend until such a demand has been made, was mentioned as a question which it was not necessary to determine in *Boston & Roxbury Mill Corp. v. Tyndale*, 425.

And, whether a corporation, which in compliance with an order of court has deposited the amount of certain unclaimed dividends in a separate fund apart from its other assets, holds the fund in trust for the payment of such dividends when properly claimed, so that, until the trust is repudiated or the right of a claimant is denied, the statute of limitations does not begin to run against such claimant, was mentioned as a question which was not passed upon. *Ibid.*

Under R. L. c. 202, § 10, if a person entitled to bring an action dies within the period fixed by the statute of limitations, the action, if it survives, may be brought by the administrator of his estate within two years after the administrator's giving bond for the discharge of his trust, although such administrator was not appointed until eighty-four years after the expiration of the original period of limitation. *Ibid.*

Upon an agreed statement of facts, in which it is stated that a certain person disappeared in 1818 and never was heard of again although diligent inquiries were made, this court under St. 1913, c. 716, § 5, may draw the inference that he was dead in 1825 and consequently had died before February 14, 1831, when the six year period of limitation on his right to sue for a certain dividend expired. *Ibid.*

MAINE.

A woman who in Maine under a Maine statute had procured a divorce with a decree ordering that the libellee pay to her a certain amount per week till further order of the court, and that in default of any of such payments for the space of two months, an execution was "to issue therefor," and who within a year thereafter had married another, was allowed to maintain an action of contract here upon an execution for arrears of alimony which had accumulated during four years after the decree. *Taylor v. Stowe*, 248.

MALICIOUS INTERFERENCE.

See *EQUITY JURISDICTION, To enjoin Unlawful Interference.*

MANDAMUS.

If, after the incorporation of a cemetery corporation in 1905 under R. L. cc. 78, 123, the incorporators illegally issued and sold capital stock for cash and

then adopted by-laws excluding the purchasers of such stock from participation in the business affairs of the corporation and perpetuating its control in themselves and their nominees, and in 1913 the Legislature by a special act confirmed and made valid the issue of stock and the by-laws, the persons to whom the stock was issued thereafter have the rights of stockholders, and, if such rights are not recognized, may enforce them by a petition for a writ of mandamus, and not by a bill in equity. *Granara v. Italian Catholic Cemetery Association*, 387.

On a petition for a writ of mandamus to compel the Supreme Lodge of a fraternal beneficiary corporation to reinstate a subordinate lodge of which the petitioners were members, it was held on the facts that the petition was brought prematurely by reason of the failure of the petitioners first to resort to an appeal to the Supreme Lodge, the facts not disclosing that this mode of relief furnished by the constitution and by-laws of the order would be an idle ceremony. *Correia v. Portuguese Fraternity*, 305.

MARRIAGE AND DIVORCE.

A woman who in Maine under a Maine statute had procured a divorce with a decree ordering that the libellee pay to her a certain amount per week till further order of the court, and that, in default of any of such payments for the space of two months, an execution was "to issue therefor," and, who within a year thereafter had married another, was allowed to maintain an action of contract here upon an execution for arrears of alimony which had accumulated during four years after the decree. *Taylor v. Stowe*, 248.

Under R. L. c. 152, § 35, a divorce obtained by an inhabitant of this Commonwealth in another State, into which he went for the purpose, "for a cause which occurred, if at all, in this Commonwealth while the parties resided here," can have no force or effect in this Commonwealth. *Malooof v. Abdallah*, 21.

Consequently such a divorce has no effect to end the liability of a husband obtaining it for the separate support of his wife ordered by the Probate Court under R. L. c. 153, § 33. *Ibid.*

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY.

The land of the Massachusetts Institute of Technology abutting on Boylston, Clarendon and Newbury Streets in Boston is subject to equitable restrictions, in favor of the owners of lots on those streets opposite the open rectangle of land of which that corporation was granted the use of two thirds, that such two thirds of the rectangle shall forever be kept as an open space or for the use of the corporation for its educational and scientific purposes, and that, if and while so used, the corporation shall not cover with its buildings more than one third part of the area of the land designated for its use. *Massachusetts Institute of Technology v. Boston Society of Natural History*, 189.

The effect of the passage of St. 1861, c. 183, §§ 3, 4, 6, 7, and of the sales there-

Massachusetts Institute of Technology (*continued*).

after made by the Commonwealth under § 4 of that statute of lots of land on Boylston, Clarendon and Newbury Streets in Boston facing the land held by the Massachusetts Institute of Technology, was to create equitable restrictions for the benefit of the subsequent purchasers of those lots, subject to which the Commonwealth by St. 1903, c. 438, released to the Massachusetts Institute of Technology all rights which had been retained by the Commonwealth in the land held by that corporation under St. 1861, c. 183. *Massachusetts Institute of Technology v. Boston Society of Natural History*, 189.

In the equitable restriction imposed by § 3 of St. 1861, c. 183, it was not intended to prohibit the passing of a bare legal title, but to require that the land, if not used for the educational purposes of the corporation, should be kept as an open space. *Ibid.*

The equitable restriction imposed by § 7 of that statute does not require that the location of the buildings when once fixed to the satisfaction of the Governor and Council shall not be changed. *Ibid.*

The equitable restrictions imposed by certain sections of St. 1861, c. 183, on the land designated for the use of the Massachusetts Institute of Technology were not imposed for the benefit of the Boston Society of Natural History, which was granted the use of adjoining land by § 5 of the same statute. *Ibid.*

MASTER AND SERVANT.

See AGENCY.

MECHANIC'S LIEN.

In a suit in equity to enforce an agreement by the defendant, made in consideration of the plaintiff releasing a claim of a mechanic's lien on real estate of the defendant upon the defendant giving him a bond without sureties for the payment of final judgment establishing his lien, that the defendant would not appeal from a judgment of a police court on a petition by the plaintiff for the enforcement of the lien, on an appeal from a final decree enjoining the defendant from prosecuting his appeal from, and ordering him to pay to the plaintiff the amount of, the judgment rendered on the petition to enforce the lien, it was held that the decree must be affirmed, because it did not appear that the findings of fact upon which it was founded were plainly wrong. *Palmer v. Lavers*, 286.

The provisions of R. L. c. 173, § 70, that "agreements of attorneys relative to an action or proceeding shall be in writing" in order to be of validity, has no effect upon an agreement, made by an owner of real estate through his attorney for a good consideration, to abide by the judgment of a police court on a petition thereafter to be filed for the enforcement of a mechanic's lien. *Ibid.*

MERGER.

It is no defense to an action of contract upon an account annexed that the plaintiff's claim previously had been allowed by a referee in bankruptcy in proceedings under the bankruptcy act of 1898 in which no dividend was paid on the bankrupt's estate and the bankrupt was refused a discharge. *Valente v. Cosentino*, 125.

MILK.

Circumstances under which, at the trial of an action of contract for the price of milk sold and delivered, the plaintiff, on the evidence and the presumption of innocence, was held to be entitled to go to the jury, although he had introduced no direct evidence that the percentage of milk solids contained in the milk sold by him to the defendant was that required by R. L. c. 56, § 56. *Whitcomb v. Boston Dairy Co.* 24.

MORTGAGE.

Of Real Estate.

Jurisdiction of the Probate Court to grant to trustees power to mortgage real estate under R. L. c. 147, § 18. *Long v. Simmons Female College*, 135.

Of Property of Street Railway Company.

The omission, in the codification of the railroad and street railway laws in St. 1906, c. 463, of the reference in R. L. c. 112, § 24, to c. 111, § 70, by which the Supreme Judicial Court was given exclusive jurisdiction of all questions arising out of street railway mortgages, is significant of a legislative purpose to change the law; and, since such codification, the court of appropriate jurisdiction of a suit to foreclose a trust mortgage upon the property of a street railway company is to be determined apart from any express statute. *Federal Trust Co. v. Bristol County Street Railway*, 367.

The Superior Court has jurisdiction of a suit in equity to foreclose a trust mortgage upon the property of a street railway company in this Commonwealth. *Ibid.*

Where a mortgagee under a trust mortgage of property of a street railway company purchased a tax title of certain land of the company and conveyed it to a receiver duly appointed of the property of the company, reserving "all other interests thereon now on record in" his name, and the receiver conveys all of the property of the company by a deed stating that the conveyance is subject to the mortgage, a title in the land free from the mortgage does not pass to the purchaser from the receiver because the receiver stood in the place of the company. *Ibid.*

In a suit in equity for the foreclosure of a certain trust mortgage upon the property of a Massachusetts street railway company, which had been sold by a receiver by judicial sale to persons who formed a new corporation to take it over, it was held that, on the facts appearing, the new corporation was estopped to deny the validity of the mortgage on the ground that there were fatal defects in the organization of the original company. *Ibid.*

In the above suit it also was held, that, because of the explicit nature of the decree as to the mortgage, a provision in the decree of the United States Circuit Court giving the receiver power to sell, in substance that the sale should be subject, not only to the mortgage in question, but also to other ordinary liens, and that the purchaser should have the right to contest the establishment of such liens, could not be construed as giving to the new

Mortgage (continued).

company a right, after the sale and conveyance to it under the circumstances above described, to contest the validity of the mortgage. *Federal Trust Co. v. Bristol County Street Railway*, 367.

It also was held that the issuing of certain new bonds in substitution for those originally issued did not invalidate the mortgage. *Ibid.*

MOTIVE.

Evidence of, see appropriate subtitle under EVIDENCE.

MUNICIPAL CORPORATIONS.

By-laws and Ordinances.

A steam engine to be used for the purpose of removing a portion of a ledge of rock, which is set upon a concrete foundation and bolted and braced to the concrete in such a manner as to be immovable and free from vibration and which would be used in the same place for a period of at least two or three years, is a "stationary steam engine" within the meaning of a city ordinance, which provides that such an engine shall not be erected or put up within five hundred feet of a dwelling house or a public building without a license from the board of aldermen. *McDonough v. Almy*, 409.

Power to borrow Money for Waterworks.

The fact, that the amount of bonds to be issued in accordance with a contract of purchase of waterworks by a town was in excess of the debt limit of three per cent of the last tax valuation prescribed by R. L. c. 27, § 4, was not material, it appearing that the amount did not exceed the limit of ten per cent of that valuation prescribed by R. L. c. 25, § 32, as to bonds issued for the purchase of such rights. *Revere v. Revere Water Co.* 161.

Security from Contractor building Public Works.

The provision of a contract with a city for the construction of a bath house, that from monthly payments to the contractor sufficient sums should be deducted and retained by the city "to settle claims for materials or labor furnished for carrying on the contract, notice of which claims, signed and sworn to by the claimants severally, shall have been filed" in the office of the city or with officers as specified in the contract, were held to have satisfied the requirements of St. 1909, c. 514, § 23, as to security. *Hunter v. Boston*, 535.

Such security having been given, a surety company bond, with a condition to the effect that the contractor should "faithfully furnish the material and do the work required of him by the contract," was held to be of no benefit, and to furnish no remedy, to creditors to whom, for materials furnished in the performance of the contract, balances were owed by the contractor, who had become bankrupt. *Ibid.*

MUNICIPAL COURT OF THE CITY OF BOSTON.

Appellate Division.

Construction of a report by a judge of the Municipal Court of the City of Boston to the Appellate Division, from which it was held that the judge intended to report the question of the correctness both of a ruling he gave and of his refusal to give a ruling asked for; and that his refusal to give the ruling asked for and the ruling he gave both were correct. *Seckendorf v. Wachtel-Pickert Co.* 126.

NEGLIGENCE.

Venue of Action resulting from Negligence.

Since St. 1904, c. 320, an action against a city, town, person or corporation to recover for injury or damage received in this Commonwealth by reason of negligence cannot be brought in any county other than the county in which the plaintiff lives or has his usual place of business or in the county in which the alleged injury or damage was received, even though it be brought by trustee process and a trustee named in the writ has a usual place of business in such other county. *Sandler v. Boston Elevated Railway*, 333.

Due Care of Plaintiff.

Of the driver of an automobile on a single track of a street railway company where the road on both sides of the track is obstructed by snow piled there by snow plows. *Richardson v. Haverhill & Amesbury Street Railway*, 52.

Of the driver of a swill cart who, in passing around a vehicle standing next to the curb, passed upon a street railway track and was struck by a street railway car. *Hall v. Bay State Street Railway*, 119.

Of a woman who, having alighted from a street railway car, was attempting to cross the street from behind it and was struck by the drip rail of a car passing on a parallel track. *Emery v. Boston Elevated Railway*, 255.

Of one who drove a horse and buggy upon a street railway track diagonally in front of a car approaching from behind. *Collins v. Boston Elevated Railway*, 284.

Due Care of Plaintiff's Decedent.

Of a person in a tree with a long pole removing moths' nests, who was killed when he received a shock from electricity in a wire passing through the tree. *Philbin v. Marlborough Electric Co.* 394.

Of the driver of a motor truck backing across a railroad track at the side of a street and struck by some freight cars kicked down the track by a freight engine. *Kilburn v. New York, New Haven, & Hartford Railroad*, 493.

Certain evidence relating to the conduct of a traveller on foot who, while crossing street railway tracks in a city street, was struck and killed by a street railway car which he had seen approaching when about one hundred and seventy-five feet away and which, without his appreciating it, was running at a very excessive speed, was held to be affirmative evidence of his due care under the requirement of St. 1907, c. 392. *Kane v. Boston Elevated Railway*, 101.

Imputed.

If the driver of a motor truck, that was struck by freight cars kicked down by a switching engine on a railroad track at the side of a street across which he had backed his truck, had with him in the truck at the time of the accident a helper on whom to some extent he may have relied to ascertain whether there was danger in backing across the track, and if the circumstances justify a finding not only that the driver but also that the helper acted with due care, it does not matter whether the driver relied for his protection upon himself alone or whether he relied to some extent upon the helper. *Kilburn v. New York, New Haven, & Hartford Railroad*, 493.

Invited Person.

An invitation, by a general contractor in charge of alterations in a building to an employee of a subcontractor, to use in the course of his employment stairs which workmen of the contractor have nearly completed and upon which they are laying balusters or rounds, is an invitation to use the stairs in the condition in which they are as to light and incompleteness. *Cole v. L. D. Willcutt & Sons Co.* 71.

Therefore such employee of a subcontractor has no right of recovery from the general contractor for personal injuries caused by his stepping on a round lying upon the stairs and slipping and falling, because the general contractor owed him no duty to give him any warning of such a risk, which was obvious upon proper inspection. *Ibid.*

The mere facts, that a street railway company placed a fence around a car barn maintained by it in such a position with reference to a well worn path, which was outside of the fence but on its premises, that persons were likely to be and were attracted to the use of the path, and that it permitted such use, in the absence of evidence that the path was laid out or wrought by it, does not constitute even an implied invitation by it to such persons to use the premises. *Romana v. Boston Elevated Railway*, 76.

In an action against the company by a child who while using such a path was injured by a shock from a current of electricity in a pole of the defendant near the path, the plaintiff in order to recover must show that his injuries were caused by wilful, wanton or reckless misconduct on the part of the defendant or of its servants or agents. *Ibid.*

Exceptions by the defendant, at the trial of such an action, where there was no evidence which would warrant a finding that the plaintiff was invited to use the path, but there was evidence tending to show that he was using it as a licensee of the defendant or as a trespasser and that the defendant was guilty of wanton, reckless and wilful misconduct toward him, were sustained because under the judge's charge the jury might have found that the plaintiff was invited to use the path and was injured by negligence of the defendant which was not wanton, reckless and wilful misconduct. *Ibid.*

Licensees.

At the trial of an action against a corporation for personal injuries suffered by a trespasser or mere licensee upon premises of the defendant, the judge is not required to give at the request of the defendant a ruling that "the

wilful and wanton negligence of which the defendant must have been guilty to make it liable . . . is a degree of negligence for which in a case resulting in death a jury in a criminal case could find a verdict of manslaughter."

Romana v. Boston Elevated Railway, 76.

Action by a girl ten years of age against a street railway company for personal injuries sustained, while the plaintiff was using a path upon premises of the defendant near a car barn, by her coming in contact with a pole next to the path charged with electricity from the defendant's wires, where there was held to be evidence which tended to show that the plaintiff was permitted by the defendant to use the path and that the pole had become charged with electricity through conduct of an employee which was known or should have been known by the defendant, accompanied by a wanton and reckless disregard of its probable consequences. *Ibid*.

Trespasser.

At the trial of an action against a corporation for personal injuries suffered by a trespasser or mere licensee upon premises of the defendant, the judge is not required to give at the request of the defendant a ruling that "the wilful and wanton negligence of which the defendant must have been guilty to make it liable . . . is a degree of negligence for which in a case resulting in death a jury in a criminal case could find a verdict of manslaughter."

Romana v. Boston Elevated Railway, 76.

If the son of the owner of certain land, while engaged in removing browntail moths' nests from a tree on the land, reaches with a pole across the boundary of the land to cut off a nest on a bough of the tree which overhangs land of an adjoining owner, he is not a trespasser, and if, while he is in the exercise of due care, the pole comes in contact with an uninsulated wire carrying a current of electricity of dangerous voltage negligently permitted by an electric power company to pass through the branches of the tree, and he is killed, an action may be maintained by the administrator of his estate against the company for causing his death. *Philbin v. Marlborough Electric Co.* 394.

Employer's Liability.

Assumption of risk.

At the trial of an action by a workman against his employer for personal injuries caused by an explosion of naphtha after it had been poured into a large kettle containing a substance being compounded as a coating for patent leather, where it appeared that the naphtha was ignited by sparks clinging to soot on the kettle, it was held that the risk was not one which the plaintiff assumed as a part of his contract of employment. *Maddox v. Ballard*, 55.

Superintendence.

In an action by an experienced workman against his employer, the proprietor of an elliptical coal run for loading vessels, for personal injuries sustained, while the plaintiff was connecting a car with the endless chain that moved the cars, by a disconnected car being pushed against him, it was held that a certain order of a superintendent did not mean that the engine should be run at an unusual rate of speed, and that there was no evidence of negligence on the part of the defendant. *Martin v. Curran*, 458.

*Negligence (continued).***Person in charge of train.**

Evidence at the trial of an action under St. 1909, c. 514, § 127, cl. 3; § 129, against an elevated railway company for causing the death of a workman of the defendant who was run over by an elevated train while he with others was engaged in work upon the defendant's apparatus on the elevated tracks, relying upon a warning to be given by a foreman or fellow workman of the approach of trains, which was held not to show negligence on the part of the motorman. *Connors v. Boston Elevated Railway*, 45.

Dangerous or defective machinery or appliances.

Evidence at the trial of an action by a workman against his employer for personal injuries caused by an explosion of naphtha after it had been poured into a large kettle containing a substance being compounded as a coating for patent leather, where it appeared that the naphtha was ignited by sparks clinging to soot on the kettle, was held to warrant a finding of negligence on the part of the defendant in failing to provide suitable means for preventing the presence of fire in conjunction with naphtha gas, and in failing to warn the plaintiff of a danger not obvious of which the defendant should have been aware. *Maddox v. Ballard*, 55.

In the same action it was held that the risk was not one which the plaintiff assumed as a part of his contract of employment. *Ibid.*

Employer who has been found liable in an action for the death and conscious suffering of an employee caused by a defective coal car delivered to the employer by a railroad company, has no right to make the railroad company pay to him any part of the amount which he was compelled to pay to the plaintiff in such action. *Boott Mills v. Boston & Maine Railroad*, 582.

Dangerous place.

In an action by a workman against a building contractor by whom he was employed for injuries caused by the giving way of a spreader in the window frame of a building in process of construction, on which the plaintiff stepped in attempting to pass from a staging on the inside of an unfinished brick wall to a staging on the outside, in order that the proof of a custom among workmen to step on a spreader in going from an inside staging to an outside staging may affect the rights of the parties, such custom must have been uniform, universal and of such long continuance that all concerned might be presumed to know it. *Coyne v. Byrne*, 99.

Consequently the custom's existence would not make it the duty of the defendant to instruct a competent carpenter who had been in his employ for eight years that in putting in a spreader he must make it strong enough for the workmen to step on. *Ibid.*

In an action at common law after the enactment of the workmen's compensation act by a workman against his employer, who was not a subscriber under the act, for personal injuries sustained, while engaged in assisting in the work of tearing down the walls of a brick building that partially had been destroyed by fire, by reason of the alleged negligence of the defendant in failing to warn the plaintiff of the danger to which he was exposed, it was held that upon the evidence it could be found by the jury that the defendant's foreman had better means than the plaintiff of observation and of seasonably appreciating the danger and that he should have warned the plaintiff before it was too late. *Dooley v. Sullivan*, 597.

Failure to warn.

Evidence at the trial of an action by a workman against his employer for personal injuries caused by an explosion of naphtha after it had been poured into a large kettle containing a substance being compounded as a coating for patent leather, where it appeared that the naphtha was ignited by sparks clinging to soot on the kettle, was held to warrant a finding of negligence on the part of the defendant in failing to warn the plaintiff of a danger not obvious of which the defendant should have been aware. *Maddox v. Ballard*, 55.

In the same action it was held that the risk was not one which the plaintiff assumed as a part of his contract of employment. *Ibid*.

Negligence causing death.

Employer who was found liable in an action for the death and conscious suffering of an employee has no right to make a joint tortfeasor pay to him any portion of the amount which he was compelled to pay to the plaintiff in such action. *Boott Mills v. Boston & Maine Railroad*, 582.

Effect of workmen's compensation act upon non-subscribing employer.

In an action at common law by a workman against his employer for personal injuries, alleged to have been caused by the failure of the defendant to give the plaintiff notice of the dangers incident to his employment, which happened after St. 1911, c. 751, Part I, took effect, so that neither contributory negligence of the plaintiff, the negligence of a fellow employee nor the plaintiff's assumption of the risk is open as a defense, the only question to be tried is whether the defendant was negligent in failing to warn the plaintiff. *Dooley v. Sullivan*, 597.

*Street Railway.***Action by employee.**

At the trial of an action against a street railway company by a motorman for personal injuries received in a collision between two street cars, where on the pleadings the negligence of the defendant relied on by the plaintiff was that the braking appliance of the car was defective, and the case was tried on that understanding, a charge to the jury, which permitted them to find that a defect in some part of the car other than the braking appliance was the cause of the plaintiff's injuries, was held to be erroneous. *Corsick v. Boston Elevated Railway*, 144.

Person boarding car.

On the evidence at the trial of an action against a street railway company for personal injuries suffered by reason of the plaintiff being thrown to the ground by the starting of a crowded street car of the defendant by the ringing of the starting bell as she was boarding it at a regular stopping place, where it appeared that the conductor "was about two windows in the car" and "did not approach the rear platform," it was held that the jury were warranted in drawing the inference that the car was started by the defendant's servants. *Frink v. Boston Elevated Railway*, 121.

In the same action it was held that, in order to hold the defendant liable on the ground that the conductor was negligent in allowing the car to be started by a third person, it was not necessary for the plaintiff to show that

Negligence (continued).

cars habitually had been started by third persons before the day of the accident. *Frink v. Boston Elevated Railway*, 121.

It also was held that it was proper for the judge to read the quotation from the opinion in *Nichols v. Lynn & Boston Railroad*, 168 Mass. 528, at page 530, because it was applicable to the evidence. *Ibid.*

Passenger alighting from car.

A verdict for the plaintiff was held to have been warranted by the evidence at the trial of an action against a street railway company for personal injuries received by a passenger upon an open electric street car of the defendant as he was alighting from the car by the seat being turned over upon his wrist by one of a turbulent and boisterous crowd who were attempting violently to get upon the car, the presence of such a crowd at that place and time of day not being unusual and being likely to result in injury to passengers. *Danovitz v. Blue Hill Street Railway*, 42.

If, when a passenger is alighting from the front vestibule of a closed street railway car while it is in motion, a raincoat which he is wearing becomes caught in the door so that he is in danger of being injured, and this fact is called to the motorman's attention, it is the motorman's duty to stop the car in order to prevent injury to the passenger. *Hooper v. Bay State Street Railway*, 251.

At the trial of an action for an injury so received, the plaintiff testified in substance that he ran beside the car before he fell about one hundred feet, shouting continuously, but no person testified that he had heard the continuous shouting and it was held that there was no evidence to warrant a finding that the motorman heard or ought to have heard the shouting. *Ibid.*

Where the motorman on such car, upon being told by a passenger standing beside him in a sharp commanding voice and vigorous language that he had better stop the car to see where "that fellow went to," merely shut off the power and applied the brake, it is not evidence of negligence on his part that he did not also reverse the power, which he knew would have stopped the car sooner. *Ibid.*

Contradictory statements of a witness in such action which were held to raise a question for the jury to determine. *Ibid.*

If an open electric street railway car has come nearly to a stop at a place where passengers generally may be expected to alight, it is negligence on the part of the persons in charge of the car, although they may not have seen any signal by a passenger desiring to alight, to cause the car suddenly to go forward at an accelerated speed without taking precautions to ascertain whether passengers are preparing to alight by stepping to the running board. *Weil v. Boston Elevated Railway*, 397.

If a street railway company equips an open electric car with a system of push buttons and bells operated by electric batteries for the use of passengers in signalling for the stopping of the car, and the system frequently becomes unworkable by reason of exhaustion of the batteries, it is a duty of the company, which it cannot avoid by delegation to others, to keep the system in working order or properly to notify passengers of its disuse. *Ibid.*

And if a passenger on a car with such a system which is not in working order, not knowing the system to be out of order and relying upon its being in good condition, pushes a button to signal for the stopping of the car, hears

a strap bell signal given to the motorman for the stopping of the car and thinks it is in response to the signal he has given, and, as the car slackens its speed and comes nearly to a stop at a regular stopping place, steps upon the running board to alight, from which he is thrown to the ground by a resumption of accelerated speed by the car and receives injuries which result in his conscious suffering and death, such injuries may be found to have been caused by negligence of the company in not performing its duty as to the system of push buttons and bells. *Weil v. Boston Elevated Railway*, 397.

At the trial together of two actions against a street railway company, one for the conscious suffering and the other for the death of a passenger who, while alighting from an open street car of the defendant in 1908, after he had given a signal for the stopping of the car by an electric push button and the car had stopped, was caused to fall to the ground when the car suddenly was started, it was held that there was evidence of negligence on the part either of the motorman or of the conductor. *Ibid.*

Where the declaration in an action of tort against a street railway company for the conscious suffering and death of a passenger in 1908 alleged that the decedent was caused to fall, as he was alighting from an open street car of the defendant, by "gross negligence" of the servants and agents of the defendant in the manner in which they "started, stopped and operated" the car, under the circumstances it was held that the word "gross" in the declaration might be disregarded, and that the plaintiff was not precluded from having the jury pass upon all the issues raised by the pleadings. *Ibid.*

Traveller on highway.

Evidence warranting a finding of negligence on the part of a motorman who, in operating a street railway car in winter upon a single track at a part of the road where he knew that for some days the snow drifts had compelled the drivers of vehicles to travel on the track without the means of turning off on either side, with his view obstructed by frost on the glass in front of him, ran the car at the rate of thirty miles an hour and ran into an approaching automobile, which he could have seen a long distance away. *Richardson v. Haverhill & Amesbury Street Railway*, 52.

Certain evidence relating to the conduct of a traveller on foot who, while crossing street railway tracks in a city street, was struck and killed by a street railway car which he had seen approaching when about one hundred and seventy-five feet away and which, without his appreciating it, was running at a very excessive speed, was held to be affirmative evidence of his due care under the requirement of St. 1907, c. 392. *Kane v. Boston Elevated Railway*, 101.

Evidence at the trial of an action against a street railway company by the driver of a swill cart to recover for personal injuries caused by the cart being run into from behind by a street car of the defendant as the plaintiff was passing upon the defendant's track around another vehicle standing next to the curb was held to make the question of the plaintiff's due care for the jury. *Hall v. Bay State Street Railway*, 119.

The evidence in an action by a woman against a street railway company for personal injuries caused by the plaintiff being struck by the drip rail of a street car of the defendant as she was crossing a street from behind another car bound in the other direction on a parallel track, was held to warrant

Negligence (continued).

the jury in finding that the plaintiff was in the exercise of due care. *Emery v. Boston Elevated Railway*, 255.

In such an action, evidence tending to show that the motorman of the car which struck the plaintiff was violating rules of the defendant which required him to run slowly and to sound a gong when passing a stationary car will warrant a finding that the motorman was negligent. *Ibid.*

Elevated Railway.

Twenty miles an hour is not a reckless or excessive rate of speed for the running of an elevated train around curves under ordinary conditions. *Connors v. Boston Elevated Railway*, 45.

Evidence at the trial of an action under St. 1909, c. 514, § 127, cl. 3; § 129, against an elevated railway company for causing the death of a workman of the defendant who was run over by an elevated train while he was engaged in work upon the defendant's apparatus on the elevated tracks, relying upon a warning to be given by a foreman or fellow workman of the approach of trains, which was held not to show negligence on the part of the motorman. *Ibid.*

In an action by a woman against a corporation operating an elevated railway for personal injuries sustained by the plaintiff by being pushed from the platform of a car on a train of the defendant, if it can be found that the plaintiff was carried off her feet because of the conflict between incoming and outgoing passengers at a crowded elevated station of the defendant, who were acting contrary to a rule of the defendant which the defendant's servants made no attempt to enforce, there is evidence for the jury of the defendant's negligence. *O'Day v. Boston Elevated Railway*, 515.

In such an action the plaintiff, for the purpose of showing that the defendant had reason to anticipate trouble from the crowded condition of the platform, should be allowed to show what had occurred on previous occasions under the same conditions that obtained at the time the accident happened, although it did not occur at the same hour of the day. *Ibid.*

If a woman passenger on a train of the elevated railway is pushed from the platform of a car at a station and falls so that one of her legs is wedged between the step of the car and the station platform, and if the servants of the corporation operating the railway, after finding that the woman cannot be extricated from her plight by the use of reasonable force, drag her out by the use of unreasonable force so that her leg is injured greatly, although there were tools at hand which might have been used to release her leg by cutting away a part of the platform, this gives the injured passenger a right of action against the corporation, irrespective of the cause of her fall from the car. *Ibid.*

In Station.

In an action by a woman against a corporation operating an elevated railway for personal injuries sustained by the plaintiff by being pushed from the platform of a car on a train of the defendant, if it can be found that the plaintiff was carried off her feet because of the conflict between incoming and outgoing passengers at a crowded elevated station of the defendant, who were acting contrary to a rule of the defendant which the defendant's

servants made no attempt to enforce, there is evidence for the jury of the defendant's negligence. *O'Day v. Boston Elevated Railway*, 515.

In such an action the plaintiff, for the purpose of showing that the defendant had reason to anticipate trouble from the crowded condition of the platform, should be allowed to show what had occurred on previous occasions under the same conditions that obtained at the time the accident happened, although it did not occur at the same hour of the day. *Ibid.*

In Use of Highway.

Evidence warranting a finding of negligence on the part of a motorman who, in operating a street railway car in winter upon a single track at a part of the road where he knew that for some days the snow drifts had compelled the drivers of vehicles to travel on the track without the means of turning off on either side, with his view obstructed by frost on the glass in front of him, ran the car at the rate of thirty miles an hour and ran into an approaching automobile, which he could have seen a long distance away. *Richardson v. Haverhill & Amesbury Street Railway*, 52.

Evidence warranting a finding of due care on the part of the driver of the automobile in such case. *Ibid.*

Certain evidence relating to the conduct of a traveller on foot who, while crossing street railway tracks in a city street, was struck and killed by a street railway car which he had seen approaching when about one hundred and seventy-five feet away and which, without his appreciating it, was running at a very excessive speed, was held to be affirmative evidence of his due care under the requirement of St. 1907. *Kane v. Boston Elevated Railway*, 101.

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The evidence in an action by a woman against a street railway company for personal injuries caused by the plaintiff being struck by the drip rail of a street car of the defendant as she was crossing a street from behind another car bound in the other direction on a parallel track, was held to warrant the jury in finding that the plaintiff was in the exercise of due care. *Emery v. Boston Elevated Railway*, 255.

At the trial of an action against a corporation operating a street railway for injuries to the plaintiff's horse and buggy, it was held that there was no evidence of due care of the plaintiff's servant who was driving the horse, although he testified that, before turning to drive across the parallel tracks of the defendant, he looked back for the distance of four hundred feet and saw that the tracks behind him were clear, and that, when he was driving diagonally across the tracks and just before he had reached the second track, a car on that track, coming from behind, struck the buggy and then stopped within its own length. *Collins v. Boston Elevated Railway*, 284.

Negligence (continued).

On Railroad Track at Side of Highway.

Evidence in an action for the death of the driver of a large motor truck, who, seeing some freight cars standing on a railroad track at the side of a street several hundred feet away with no engine in sight and thinking that he could back the truck across the track to deliver some packages at the shipping room of a mill and get off the track before the cars would be moved in any way, attempted to do so and was injured when the cars were kicked down the track by a switching engine, upon which it was held that findings were warranted, that both the driver of the motor truck and a helper employed by him were in the exercise of due care. *Kilburn v. New York, New Haven, & Hartford Railroad*, 493.

In Use of Automobile.

Negligence of the driver of an automobile on a single track of a street railway company where the road on both sides of the track is obstructed by snow piled there by snow plows. *Richardson v. Haverhill & Amesbury Street Railway*, 52.

In an action for personal injuries from being knocked down by an automobile of the defendant negligently driven by the defendant's chauffeur, where there was evidence that the chauffeur, after the happening of the accident, had told the defendant "the whole story, just the way it was," as to his using, for the purpose of obliging a friend of his own, an indirect route to reach a destination appointed for him by the defendant and that the defendant said that he had the right to do so, it was held that such evidence might have been found to have shown an admission by the defendant that, as between him and the chauffeur, the chauffeur was acting within the scope of his employment. *McKeever v. Ratcliffe*, 17.

In an action for the conscious suffering of one who was run over by an automobile of the defendant, driven by a chauffeur employed by him, who had been in the car to his own home for a noon dinner and was proceeding from his home to the residence of the defendant, it was held that there was no evidence that the chauffeur was acting within the scope of his employment by the defendant at the time of the accident, because the only reasonable inference from the evidence was that the chauffeur was to procure his own meals, and that the time required to do so was his and not the defendant's. *Hartnett v. Gryzmish*, 258.

In Use of Electricity.

Action by a girl ten years of age against a street railway company for personal injuries sustained, while the plaintiff was using a path upon premises of the defendant near a car barn, by her coming in contact with a pole next to the path charged with electricity from the defendant's wires, where there was held to be evidence which tended to show that the plaintiff was permitted by the defendant to use the path and that the pole had become charged with electricity through conduct of an employee which was known or should have been known by the defendant, accompanied by a wanton and reckless disregard of its probable consequences. *Romana v. Boston Elevated Railway*, 76.

If the son of the owner of certain land, while engaged in removing browntail moths' nests from a tree on the land, reaches with a pole across the boundary of the land to cut off a nest on a bough of the tree which overhangs land of an adjoining owner, he is not a trespasser, and if, while he is in the exercise of due care, the pole comes in contact with an uninsulated wire carrying a current of electricity of dangerous voltage negligently permitted by an electric power company to pass through the branches of the tree, and he is killed, an action may be maintained by the administrator of his estate against the company for causing his death. *Philbin v. Marlborough Electric Co.* 394.

Evidence warranted a finding of due care on the part of the decedent in such case. *Ibid.*

In Use or Control of Explosives.

In an action for personal injuries from an explosion caused by the bursting of a cylindrical steel tank filled with carbonic acid gas, proof of the fact, that the explosion occurred in the basement of a building owned and, with the exception of the first floor, occupied by the defendant as a factory, was held not to be evidence for the jury of the defendant's liability, because there was nothing to show that at the time of the explosion the tank was in the defendant's custody or control. *Conley v. United Drug Co.* 238.

Of one owning or controlling Real Estate.

Owner of a building, who let the entire second floor to a milliner but retained control of a front stairway leading to a landing on the second floor and of the landing itself, on which were doors leading to the milliner's rooms, and also of a rear stairway which was approached from the landing through a closed door and led to the rear of the first floor, was held not to be liable for personal injuries received by a customer of the milliner who fell down the back stairs. *Morong v. Spofford*, 50.

Of Warehouseman.

Whether a warehouseman, whose agent has authority to issue receipts on the delivery of goods to the warehouseman and who issues a receipt for goods which the warehouseman never received, may be made liable upon such instrument if the warehouseman was negligent in the way in which he allowed such agent to conduct his business in regard to the issuing of receipts, was mentioned as a question not passed upon in *Rosenberg v. National Dock & Storage Warehouse Co.* 518.

In Construction, Alteration or Demolition of Buildings.

An invitation, by a general contractor in charge of alterations in a building to an employee of a subcontractor, to use in the course of his employment stairs which workmen of the contractor have nearly completed and upon which they are laying balusters or rounds, is an invitation to use the stairs in the condition in which they are as to light and incompleteness. *Cole v. L. D. Wilcutt & Sons Co.* 71.

Therefore such employee of a subcontractor has no right of recovery from the

Negligence (continued).

general contractor for personal injuries caused by his stepping on a round lying upon the stairs and slipping and falling, because the general contractor owed him no duty to give him any warning of such risk, which was obvious upon proper inspection. *Cole v. L. D. Wilcutt & Sons Co.* 71.

In an action by a workman against a building contractor by whom he was employed for injuries caused by the giving way of a spreader in the window frame of a building in process of construction, on which the plaintiff stepped in attempting to pass from a staging on the inside of an unfinished brick wall to a staging on the outside, in order that the proof of a custom among workmen to step on a spreader in going from an inside staging to an outside staging may affect the rights of the parties, such custom must have been uniform, universal and of such long continuance that all concerned might be presumed to know it. *Coyne v. Byrne*, 99.

Consequently the custom's existence would not make it the duty of the defendant to instruct a competent carpenter who had been in his employ for eight years that in putting in a spreader he must make it strong enough for the workmen to step on. *Ibid.*

In an action at common law after the enactment of the workmen's compensation act by a workman against his employer, who was not a subscriber under the act, for personal injuries sustained, while engaged in assisting in the work of tearing down the walls of a brick building that partially had been destroyed by fire, by reason of the alleged negligence of the defendant in failing to warn the plaintiff of the danger to which he was exposed, it was held that upon the evidence it could be found by the jury that the defendant's foreman had better means than the plaintiff of observation and of seasonably appreciating the danger and that he should have warned the plaintiff before it was too late. *Dooley v. Sullivan*, 597.

In dragging Heavy Stone.

A contractor's foreman, who orders a teamster of twenty-five years' experience, whom he has hired with his team from a master teamster, to unhitch from the wagon the pair of horses he has brought with him and hitch them to a lead bar for the purpose of dragging a flagstone six feet long by three feet wide to a place about forty feet distant, owes no duty to the teamster to tell him that, if he has only ordinary reins, he should walk alongside the horses in a place of safety instead of walking between the horses and the stone where he may be hit by the stone as it is being jolted over rough ground. *McCann v. Central Construction Co.* 595.

In a Factory.

Evidence at the trial of an action by a workman against his employer for personal injuries caused by an explosion of naphtha after it had been poured into a large kettle containing a substance being compounded as a coating for patent leather, where it appeared that the naphtha was ignited by sparks clinging to soot on the kettle, was held to warrant a finding of negligence on the part of the defendant in failing to provide suitable means for preventing the presence of fire in conjunction with naphtha gas, and in failing to warn the plaintiff of a danger not obvious of which the defendant should have been aware. *Maddox v. Ballard*, 55.

In the same action it was held that the risk was not one which the plaintiff assumed as a part of his contract of employment. *Maddox v. Ballard*, 55.

In an action for personal injuries from an explosion caused by the bursting of a cylindrical steel tank filled with carbonic acid gas, proof of the fact, that the explosion occurred in the basement of a building owned and, with the exception of the first floor, occupied by the defendant as a factory was held not to be evidence for the jury of the defendant's liability, because there was nothing to show that at the time of the explosion the tank was in the defendant's custody. *Conley v. United Drug Co.* 238.

Fright accompanied by Physical Injury.

It seems that if a girl is at work in a shop and an explosion occurs so violent as to splinter and rip up the floor and throw bottles about the room and break them, and the girl thereupon faints and cannot remember that she was struck by anything or was thrown down, but on an examination made after the accident a physician finds bruises on her body which could have been caused by a fall or by being thrown violently against some object in the room, the girl has a cause of action against a person whose wrongful act or negligence caused the explosion, although the principal injuries suffered by her were due to fright, there being evidence of accompanying physical injury. *Conley v. United Drug Co.* 238.

It seems that, if a girl is so frightened by an explosion that she faints and falls unconscious to the floor, where she sustains some physical injury, she has a cause of action against a person who wrongfully caused the explosion. *Ibid.*

Reckless and Wanton Misconduct.

Action by a girl ten years of age against a street railway company for personal injuries sustained, while the plaintiff was using a path upon premises of the defendant near a car barn, by her coming in contact with a pole next to the path charged with electricity from the defendant's wires, where there was held to be evidence which tended to show that the plaintiff was permitted by the defendant to use the path and that the pole had become charged with electricity through conduct of an employee which was known or should have been known by the defendant, accompanied by a wanton and reckless disregard of its probable consequences. *Romana v. Boston Elevated Railway*, 76.

Exceptions by the defendant, at the trial of such action where there was no evidence which would warrant a finding that the plaintiff was invited to use the path, but there was evidence tending to show that he was using it as a licensee of the defendant or as a trespasser and that the defendant was guilty of wanton, reckless and wilful misconduct toward him, were sustained because under the judge's charge the jury might have found that the plaintiff was invited to use the path and was injured by negligence of the defendant which was not wanton, reckless and wilful misconduct. *Ibid.*

"Serious and Wilful Misconduct."

What amounts to the serious and wilful misconduct of an employer, which, under the provision of St. 1911, c. 751, Part II, § 3, requires the doubling

Negligence (continued).

of the compensation to be paid for an injury to an employee under the workmen's compensation act. *Burns's Case*, 8.

The fact that an injury to an employee was occasioned by his disregard of an order of his employer is not decisive against him to show that he was "injured by reason of his serious and wilful misconduct" within the meaning of the workmen's compensation act. *Nickerson's Case*, 158.

Conduct of a whitewasher in a factory who, being directed to work near certain machinery and shafting during the noon hour when the machinery was not in motion, began to work expecting that the machinery would be stopped at noon when he would continue to work with the machinery at rest, and whose clothing was caught by a projection on the collar of the shafting, was held to warrant a finding that the employee, although in disobedience of an order, was not guilty of "serious and wilful misconduct" within the meaning of St. 1911, c. 751, Part II, § 2. *Ibid.*

"Gross."

Where the declaration in an action of tort against a street railway company for the conscious suffering and death of a passenger in 1908 alleged that the decedent was caused to fall, as he was alighting from an open street car of the defendant, by "gross negligence" of the servants and agents of the defendant in the manner in which they "started, stopped and operated" the car, under the circumstances it was held that the word "gross" in the declaration might be disregarded, and that the plaintiff was not precluded from having the jury pass upon all the issues raised by the pleadings. *Weil v. Boston Elevated Railway*, 397.

Unnecessary Violence.

If a woman passenger on a train of an elevated railway is pushed from the platform of a car at a station and falls so that one of her legs is wedged between the step of the car and the station platform, and if the servants of the corporation operating the railway, after finding that the woman cannot be extricated from her plight by the use of reasonable force, drag her out by the use of unreasonable force so that her leg is injured greatly, although there were tools at hand which might have been used to release her leg by cutting away a part of the platform, this gives the injured passenger a right of action against the corporation, irrespective of the cause of her fall from the car. *O'Day v. Boston Elevated Railway*, 515.

Causing Death.

An administrator, who has appeared in an action brought by his intestate for personal injuries, cannot be allowed to amend the declaration by adding a count under R. L. c. 171, § 2, St. 1907, c. 375, for causing the death of the plaintiff's intestate. *Church v. Boylston & Woodbury Cafe Co.* 231.

Evidence at the trial of an action under St. 1909, c. 514, § 127, cl. 3; § 129, against an elevated railway company for causing the death of a workman of the defendant who was run over by an elevated train while he was engaged in work upon the defendant's apparatus on the elevated tracks, relying upon a warning to be given by a foreman or fellow workman of the

approach of trains, which was held not to show negligence on the part of the motorman. *Connors v. Boston Elevated Railway*, 45.

Certain evidence relating to the conduct of a traveller on foot who, while crossing street railway tracks in a city street, was struck and killed by a street railway car which he had seen approaching when about one hundred and seventy-five feet away and which, without his appreciating it, was running at a very excessive speed, was held to be affirmative evidence of his due care under the requirement of St. 1907, c. 392. *Kane v. Boston Elevated Railway*, 101.

Action for causing the death of a person who, when in a tree with a long pole removing moths' nests, was killed by a shock from electricity in a wire passing through the tree. *Philbin v. Marlborough Electric Co.* 394.

Action for causing the death of the driver of a motor truck who, when backing the truck across a railroad track at the side of a street, was struck by some freight cars kicked down the track by a freight engine. *Kilburn v. New York, New Haven, & Hartford Railroad*, 493.

The damages recoverable from an employer under the provisions of the employers' liability act contained in St. 1909, c. 514, §§ 128-131, for causing the death of an employee are punitive and not compensatory in character. *Boott Mills v. Boston & Maine Railroad*, 582.

Consequently an employer, who has incurred the punishment of paying the amount of a judgment against him for causing the death of an employee, cannot recover the whole or any part of the damages thus paid by him from another person who contributed to the wrongful conduct on which the judgment was founded. *Ibid.*

In the foregoing case the principle stated above was applied to an action by a mill corporation against a railroad corporation to recover the amount of a judgment paid by the plaintiff for causing the death of an employee by reason of a defect in a coal car that had been delivered to the plaintiff by the defendant in a defective condition. *Ibid.*

Violation of Rule.

In an action against a street railway company for personal injuries caused by the plaintiff being struck by a car of the defendant as she was crossing a street from behind a car bound in the opposite direction from which she just had alighted, evidence tending to show that the motorman of the car which struck the plaintiff was violating rules of the defendant which required him to run slowly and to sound a gong when passing a stationary car will warrant a finding that the motorman was negligent. *Emery v. Boston Elevated Railway*, 255.

Testimony, that a woman, who was crossing a street railway track from behind a street car from which she just had alighted, having in mind a rule of the company which operated cars on the tracks requiring that a gong should be sounded by the motorman of a car passing a stationary car, stopped and listened and heard no gong, will warrant a finding that no gong was sounded by a car which approached rapidly on the track that she was crossing and struck her. *Ibid.*

In an action by a woman against a corporation operating an elevated railway for personal injuries sustained by the plaintiff by being pushed from the platform of a car on a train of the defendant, if it can be found that the

Negligence (*continued*).

plaintiff was carried off her feet because of the conflict between incoming and outgoing passengers at a crowded elevated station of the defendant, who were acting contrary to a rule of the defendant which the defendant's servants made no attempt to enforce, there is evidence for the jury of the defendant's negligence. *O'Day v. Boston Elevated Railway*, 515.

Res ipsa loquitur.

In an action for personal injuries the rule of *res ipsa loquitur* is not applicable unless the defendant had control of the thing that caused the injury. *Conley v. United Drug Co.* 238.

In an action for personal injuries from an explosion caused by the bursting of a cylindrical steel tank filled with carbonic acid gas, proof of the fact, that the explosion occurred in the basement of a building owned and, with the exception of the first floor, occupied by the defendant as a factory, was held not to be evidence for the jury of the defendant's liability, because there was nothing to show that at the time of the explosion the tank was in the defendant's custody or control. *Ibid.*

Where it appears in evidence that a cake of ice, when being carried by a retail ice dealer with ice tongs over his shoulder through the doorway of a kitchen for delivery to a customer, fell to the floor and injured the customer, and where the cause of the fall is not explained, a jury can find that the accident would not have occurred without fault on the part of the defendant and may infer negligence from its happening. *O'Neil v. Toomey*, 242.

NEGOTIABLE INSTRUMENTS ACT.

Under the provision of the negotiable instruments act in R. L. c. 73, § 37, if the treasurer of a corporation signs a negotiable promissory note with his own name adding the word "Treasurer" followed by the name of the corporation, executing the note at a meeting of and by authority of the directors of the corporation and believing that he is executing a note of the corporation, and if the note thereupon is given in payment of a claim against the corporation, the treasurer is not liable personally on the note and has a good defense at law if he is sued on it. *Jump v. Sparling*, 324.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

NOTICE.

In order to prove that a creditor, who in an action for the collection of his debt caused an attachment of land standing in the name of his debtor to be made, had knowledge of the fact that the debtor before the attachment had delivered a deed of the premises to another, it is not necessary to prove positive knowledge on his part, but intelligible information of the fact, conveyed to him either orally or in writing from a source which ought to be heeded, is evidence upon which such knowledge can be found. *Hughes v. Williams*, 448.

And, while at the trial of such an issue evidence is admissible as to conversations with and conduct on the part of the creditor before the attachment,

tending to show such knowledge on his part, evidence of statements made by the creditor or his attorney after the attachment are irrelevant and inadmissible. *Hughes v. Williams*, 448.

OFFICER.

In an action for the alleged conversion of certain personal property of the plaintiff left by him in a vacant building belonging to the defendant which formerly had been occupied by the plaintiff as a tenant, where a material question was whether a certain police officer was acting as the agent of the defendant in preventing the plaintiff from removing his property from the building, it was held that there was no evidence warranting a finding that the police officer was the agent of the defendant, and that for this reason a certain conversation between the defendant and the police officer was not admissible in evidence. *Jean v. Cawley*, 271.

ORDER.

A certain order for printed blanks, which contained no promise to pay but ended with the words "Ordered by," followed by the defendant's name, it was held, might be found not to contain the entire contract as to the transaction described therein, so that a verbal arrangement that the goods were not to be paid for by the person signing the order might be shown in evidence and be given its full effect. *Lyman B. Brooks Co. v. Wilson*, 205.

If the holder of a construction mortgage upon buildings in process of erection, upon presentation to him of certain orders of the contractor erecting the buildings, directing that payments be made to a subcontractor from the contractor's "completion payment" and his "thirty-three day after completion payment," and the mortgagee accepts the orders by promising to make the payments when the contractor shall "earn" the respective payments, the mortgagee cannot set up, in defense to an action upon the order by the subcontractor, that the building was not fully completed, if the only reason that it was not fully completed was that the contractor and the mortgagee had agreed to dispense with the construction of a part of the building which was to have been constructed. *Swartman v. Babcock*, 334.

PARTITION.

The interest of one of the tenants in common of certain real estate, which was sold by a commissioner appointed by the Probate Court under R. L. c. 184, §§ 31, 47, to make partition of it, in the proceeds from the sale of such real estate in the hands of the commissioner is not subject to attachment by trustee process. *Travelers Ins. Co. v. Maguire*, 360.

Nor can it be reached and applied by a suit in equity under R. L. c. 159, § 3, cl. 7, to the payment of a debt due from one of the tenants in common of the real estate so sold, as that statute does not extend to a fund in the custody of the law. *Ibid.*

PARTNERSHIP.

Certain language used by a judge in his charge to a jury in an action by an employee for personal injuries against four persons, alleged to be copartners

Partnership (*continued*).

doing business under a certain firm name, which was held to have been erroneous because the jury naturally would assume from it that the description in the writ was some evidence that the defendants were copartners, whereas, if the judge chose to mention the description in the writ, he should have instructed the jury plainly that it was not evidence at all. *Ibanez v. Winston*, 469.

PATENT.

The United States courts have not exclusive jurisdiction of a suit in equity founded on an alleged breach of a contract in writing to pay a stipulated royalty on the selling price of an appliance patented by the plaintiff and manufactured and sold by the defendant under an exclusive license from the plaintiff. *Potterton v. Condit*, 216.

In a contract in writing providing for the payment of a stipulated royalty on the selling price of an appliance patented by the plaintiff and manufactured and sold by the defendant under an exclusive license from the plaintiff, the word "found," in a provision that the defendant was to be excused from paying the royalty if the plaintiff's patent should be "found at any time to infringe other patents," was construed to mean found by a court of competent jurisdiction. *Ibid*.

And the fact that the defendant received from another manufacturer a notice that the alleged patent of the plaintiff was an infringement of a patent used by said manufacturer, which was followed by no further action on his part, is immaterial. *Ibid*.

PAYMENT.

In an action for deceit, in which it was shown that the defendant by false and fraudulent representations induced the plaintiff to lend him a sum of money upon certain shares of stock as collateral, taking the note of the defendant and his wife for the amount of the loan, it is right for the trial judge to refuse to rule as matter of law that the plaintiff by taking the note accepted it in payment of the loan. *McKinley v. Warren*, 310.

PHYSICIAN.

Effect, under the workmen's compensation act, upon the right of the dependents of an employee to recover from the insurer where, through mistake or negligence of the physician attending the employee acting honestly, the injury resulted in the death of the employee. *Burns's Case*, 8.

PLAINVILLE.

Upon the water commissioners of the town of Plainville, acting under authority given to them by St. 1908, c. 404, §§ 2, 9, which was accepted by the town, purchasing land adjacent to Ten Mile River and driving wells there for the purpose of a town water supply, the owner of a mill pond which was fed by the river and by water which fed that river became entitled to maintain, under § 4 of the statute, a petition for the assessment of damages which he suffered by reason of water being diverted from his pond by the wells, although none of his land was taken by the town and no certificate was filed as required by § 3 of the statute. *Spaulding v. Plainville*, 321.

PLEADING, CIVIL.

Declaration.

Where the declaration in an action of tort against a street railway company for the conscious suffering and death of a passenger in 1908 alleged that the decedent was caused to fall, as he was alighting from an open street car of the defendant, by "gross negligence" of the servants and agents of the defendant in the manner in which they "started, stopped and operated" the car, under the circumstances it was held that the word "gross" in the declaration might be disregarded, and that the plaintiff was not precluded from having the jury pass upon all the issues raised by the pleadings. *Weil v. Boston Elevated Railway*, 397.

PLEADING, CRIMINAL.

Indictment.

The word "steal" as used in an indictment for larceny under the short form set forth in R. L. c. 218, has become a term of art and includes the criminal taking of personal property either by larceny, embezzlement or false pretenses. *Commonwealth v. Farmer*, 507.

There is nothing in the provisions of R. L. c. 218, in regard to the form of an indictment for larceny by false pretenses that violates any right secured by the Fourteenth Amendment or any other provision of the Constitution of the United States. *Ibid.*

Article 12 of the Declaration of Rights requires in an indictment for larceny only such particularity of allegation as may be of service to the defendant in enabling him to understand the charge and prepare for his defense. *Ibid.*

Where, therefore, the statutory form of indictment is used, this right is sufficiently protected by R. L. c. 218, § 39, providing for a bill of particulars in case the defendant desires more specific information as to the crime which he is alleged to have committed. *Ibid.*

PLEDGE.

In a suit in equity by the first assignee of a policy of life insurance against a second assignee to gain possession of the policy, it was held that, under the circumstances, the first assignee by his voluntary action in leaving the policy in the possession of the agent for the insured who, in behalf of the insured and in fraud of the first assignee, had pledged it to the second assignee, was estopped to deny the validity of its delivery to the second assignee, and could have possession of it only upon paying to the second assignee the amount of his note with interest and costs of suit. *Herman v. Connecticut Mutual Life Ins. Co.* 181.

In the same suit it was held that the second assignee had no right to hold the policy as security for a second note upon which, after it was signed, he had written without authority of the insured a statement that the same policy was to be held as security for it. *Ibid.*

Pledge (continued).

The provision of St. 1912, c. 675, § 5, amending the small loans act, St. 1911, c. 727, § 17, that "any loan made or note purchased, or indorsement or guarantee furnished by an unlicensed person . . . in violation of this act shall be void," does not make void in the hands of a bona fide purchaser a note given as collateral security for a note given in violation of this act. *Burnes v. New Mineral Fertilizer Co.* 300.

Application of the foregoing rule in an action against the maker and indorser of a note so purchased in violation of the act, brought by one who, with notice of such violation, purchased it at a foreclosure sale under the terms of a collateral security note, to secure which the note in suit had been pledged to one who had no notice of the violation by an associate of the unlicensed money lender. *Ibid.*

POLICE.

In an action for the alleged conversion of certain personal property of the plaintiff left by him in a vacant building belonging to the defendant which formerly had been occupied by the plaintiff as a tenant, where a material question was whether a certain police officer was acting as the agent of the defendant in preventing the plaintiff from removing his property from the building, it was held that there was no evidence warranting a finding that the police officer was the agent of the defendant, and that for this reason a certain conversation between the defendant and the police officer was not admissible in evidence. *Jean v. Cawley*, 271.

POLICE COMMISSIONER OF BOSTON.

Constitutionality of St. 1907, c. 384, § 9, giving power to the police commissioner of Boston to regulate unlicensed hawkers and peddlers in the prosecution of their business, and validity of certain regulations made by him. *Commonwealth v. Fox*, 498.

POWER.

Under the bankruptcy act of 1898 as amended by U. S. St. 1910, c. 412, § 8, a trustee in bankruptcy cannot make an appointment under a power which was to be exercised by the bankrupt only by will, even when the bankrupt is alive, much less after he is dead. *Montague v. Silsbee*, 107.

If a beneficiary for life under a trust created by will, who has a power of testamentary appointment over the trust fund which in default of such appointment is to go to his heirs at law, declares, in order to procure a loan of money, that he has made a will by which he has appointed the trust fund to others and that such an appointment will make the appointed property assets for the payment of his creditors, and afterwards dies intestate, such declaration creates no estoppel that will bind the heirs at law. *Ibid.*

And, even if one of the heirs at law joined in making the statement to induce the loan, he would be estopped to deny merely that a will had been made and existed at the time of the statement and would not be precluded from showing that a will then in existence afterwards was revoked. *Ibid.*

And such a declaration is not an agreement to make an appointment in favor of the lender of the money nor an agreement not to die intestate. *Ibid.*

PRACTICE, CIVIL.

Venue.

Since St. 1904, c. 320, an action against a city, town, person or corporation to recover for injury or damage received in this Commonwealth by reason of negligence cannot be brought in any county other than the county in which the plaintiff lives or has his usual place of business, or in the county in which the alleged injury or damage was received, even though it be brought by trustee process and a trustee named in the writ has a usual place of business in such other county. *Sandler v. Boston Elevated Railway*, 333.

Abatement.

Acts of the plaintiff in an action of tort, in which he has claimed a trial by jury and the defendant has filed a plea in abatement, which were held to have constituted a waiver of his right to have the question of fact raised by the plea passed upon by a jury, no question in regard to his constitutional right to a trial by jury being involved. *Young v. Duncan*, 346.

Amendment.

Under R. L. c. 173, § 48, the Superior Court has no power to allow a plaintiff to amend his declaration by adding to it a cause of action that could not have been intended when the writ was sued out. *Church v. Boylston & Woodbury Cafe Co.* 231.

An administrator, who has appeared in an action brought by his intestate for personal injuries, cannot be allowed to amend the declaration by adding a count under R. L. c. 171, § 2, St. 1907, c. 375, for causing the death of the plaintiff's intestate. *Ibid.*

The denial in an action at law of a motion by the defendant to amend his answer is wholly within the discretionary power of the presiding judge and is not open to exception. *Aronson v. Nurenberg*, 376.

Equitable Defense.

In an action upon a judgment, in support of a defense alleged in the answer that the action was really brought on behalf of one of the judgment debtors who had purchased the judgment, the plaintiff was held entitled to introduce in evidence a final decree dismissing after a hearing a suit in equity brought to enjoin the action upon the same ground, the parties being the same. *Flynn v. Howard*, 245.

Rules of Court.

See RULES OF COURT.

Auditor's Report.

The denial of a motion, made at a trial when an auditor's report was offered in evidence, that it should be excluded on the ground that the finding of the

Practice, Civil (continued).

auditor on the question of agency was unwarranted by evidence reported by him, was held at that stage of the case and under the circumstances to have been proper. *Jean v. Cawley*, 271.

It is a proper way to raise the question of law involved for the defendant to ask the presiding judge to rule that this finding of the auditor was not authorized by all the evidence before him and should be disregarded. *Ibid.*

Trial by Jury.

Acts of the plaintiff in an action of tort, in which he has claimed a trial by jury and the defendant has filed a plea in abatement, which were held to have constituted a waiver of his right to have the question of fact raised by the plea passed upon by a jury, no question in regard to his constitutional right to a trial by jury being involved. *Young v. Duncan*, 348.

As to conduct of trial, see *post*.

Agreed Statement of Facts.

Upon an agreed statement of facts, in which it is stated that a certain person disappeared in 1818 and never was heard of again although diligent inquiries were made, this court under St. 1913, c. 716, § 5, may draw the inference that he was dead in 1825 and consequently had died before February 14, 1831, when the six year period of limitation on his right to sue for a certain dividend expired. *Boston & Roxbury Mill Corp. v. Tyndale*, 425.

Right to prove Admitted Fact.

Upon the trial of an issue of fact, an admission by one of the parties of a certain material fact does not deprive the other party of his right to prove that fact by affirmative evidence. *Thomson v. Carruth*, 524.

Conduct of Trial.

Opening statement to jury.

Where at the trial of a civil case the plaintiff's counsel in his opening statement to the jury refers to an alleged admission made by the defendant, and, this statement being wholly unsupported by any evidence, the judge instructs the jury that it is to be disregarded, the defendant is not entitled as a matter of right to introduce evidence to contradict the counsel's unsupported statement, and the presiding judge in his discretion properly may refuse to permit him to do so. *Hutchinson v. Plant*, 148.

Opening statement of counsel to the jury, which was held not to preclude his client from having the jury pass upon all the issues raised by the pleadings. *Weil v. Boston Elevated Railway*, 397.

Order of proof.

Order of proof was held to be within the control of the trial judge in a reasonable exercise of his discretion, and certain evidence was held to have been offered seasonably. *Flynn v. Howard*, 245.

Discretionary exclusion of evidence.

Where at the trial of a civil case the plaintiff's counsel in his opening statement

to the jury refers to an alleged admission made by the defendant, and, this statement being wholly unsupported by any evidence, the judge instructs the jury that it is to be disregarded, the defendant is not entitled as a matter of right to introduce evidence to contradict the counsel's unsupported statement, and the presiding judge in his discretion properly may refuse to permit him to do so. *Hutchinson v. Plant*, 148.

Production of papers.

Where, at the trial of an action of contract the defendant, called as a witness by the plaintiff, in response to certain questions as to an interview, a statement of which he said he had dictated afterward, testifies that it was as the plaintiff's counsel read from a paper in his hand, and neither he nor his counsel then asked to see the paper, the defendant's counsel, before calling the defendant as a witness in his own behalf, is not entitled to have the paper produced for him. *Hutchinson v. Plant*, 148.

Requests, rulings and instructions.

At the trial of an action against a corporation for personal injuries suffered by a trespasser or mere licensee upon premises of the defendant, the judge is not required to give at the request of the defendant a ruling that "the wilful and wanton negligence of which the defendant must have been guilty to make it liable . . . is a degree of negligence for which in a case resulting in death a jury in a criminal case could find a verdict of manslaughter." *Romana v. Boston Elevated Railway*, 76.

Where, upon an exception to the refusal of a presiding judge to make a ruling as to the legal effect of certain facts if they should be found by the jury, the evidence reported and described in the bill of exceptions does not warrant a finding of those facts by the jury, the exception must be overruled, because it does not appear that there was any occasion for the ruling requested. *Murphy v. O'Connell*, 105.

Erroneous instructions to the jury at the trial of an action for deceit in falsely representing to the plaintiff that a certain college had authority to grant a certain degree. *Kerr v. Shurtleff*, 167.

Instruction in the charge to the jury by the judge presiding at the trial of an action for deceit, which was held inapplicable to the evidence and harmful to an excepting party, even if correct as a statement of law, so that the exception must be sustained. *Ibid.*

Where at the trial of an action, in which the question whether a certain person had authority to act as the defendant's agent is material, and an auditor's report has been introduced in evidence in which the auditor made a finding that the person in question was such agent and reported the substance of all the evidence before him upon this point, it is a proper way to raise the question of law involved for the defendant to ask the presiding judge to rule that this finding of the auditor was not authorized by all the evidence before him and should be disregarded. *Jean v. Cawley*, 271.

In an action for deceit, in which it was shown that the defendant by false and fraudulent representations induced the plaintiff to lend him a sum of money upon certain shares of stock as collateral, taking the note of the defendant and his wife for the amount of the loan, it is right for the trial judge to refuse to rule as matter of law that the plaintiff by taking the note accepted it in payment of the loan. *McKinley v. Warren*, 310.

If evidence, which was excluded by the presiding judge at a trial because he made a wrong ruling, was irrelevant and ought to have been excluded, an exception to its exclusion will be overruled. *Young v. Duncan*, 346.

Where it appears by a bill of exceptions that a certain request for a ruling was refused in the terms asked for because the judge said that he had covered it in substance in his instructions to the jury, and the instructions given by the judge on this point are not stated, it must be assumed that they were correct and sufficient. *Batchelder v. Home National Bank of Milford*, 420.

At the trial before a judge without a jury of an action for the recovery of a sum of money deposited by the plaintiff with the defendant in accordance with an agreement whereby the defendant agreed to convey to the plaintiff a certain piece of land by a deed "conveying a good and clear title . . . free from all incumbrances," it was held that an exception to a refusal of the judge to rule "that the title offered was not good beyond a reasonable doubt because of the undischarged mortgage" must be overruled. *Shanahan v. Chandler*, 441.

Judge's charge.

Exceptions by the defendant, at the trial of an action for personal injuries sustained while the plaintiff was using a path on premises of the defendant where there was no evidence which would warrant a finding that the plaintiff was invited to use the path, but there was evidence tending to show that he was using it as a licensee of the defendant or as a trespasser and that the defendant was guilty of wanton, reckless and wilful misconduct toward him, were sustained because under the judge's charge the jury might have found that the plaintiff was invited to use the path and was injured by negligence of the defendant which was not wanton, reckless and wilful misconduct. *Romana v. Boston Elevated Railway*, 76.

The reading, by a judge in his charge at the trial of an action against a street railway company for personal injuries caused by the starting of a street car as the plaintiff was in the act of boarding it because a starting signal was given when the conductor was inside the car, of a portion of the opinion in *Nichols v. Lynn & Boston Railroad*, 168 Mass. 528, at page 530, was held to have been proper because it was applicable to the evidence. *Frink v. Boston Elevated Railway*, 121.

At the trial of an action against a street railway company by a motorman for personal injuries received in a collision between two street cars, where on the pleadings the negligence of the defendant relied on by the plaintiff was that the braking appliance of the car was defective and the case was tried on that understanding, a charge to the jury which permitted them to find that a defect in some part of the car other than the braking appliance was the cause of the plaintiff's injuries was held to be erroneous. *Corrick v. Boston Elevated Railway*, 144.

Certain error in the admission of irrelevant evidence which was held not to have been cured by instructions given to the jury, so that exceptions to its admission were sustained. *Hughes v. Williams*, 448.

Certain language used by a judge in his charge to a jury in an action by an employee for personal injuries against four persons, alleged to be copartners doing business under a certain firm name, which was held to have been erroneous because the jury naturally would assume from it that the de-

scription in the writ was some evidence that the defendants were copartners, whereas, if the judge chose to mention the description in the writ, he should have instructed the jury plainly that it was not evidence at all. *Ibanez v. Winston*, 469.

Ordering Verdict.

Circumstances under which, at the trial of an action of contract for the price of milk sold and delivered, it was held erroneous to order a verdict for the defendant because the plaintiff, on the evidence and the presumption of innocence, was entitled to go to the jury, although he had introduced no direct evidence that the percentage of milk solids contained in the milk sold by him to the defendant was that required by R. L. c. 56, § 56. *Whitcomb v. Boston Dairy Co.* 24.

Verdict.

Order, made after a verdict had been returned for a plaintiff in a large amount, that, unless the plaintiff should remit a substantial amount named, the verdict should be set aside and a new trial granted upon the question of damages only and also that a special finding of the jury that no damages should be awarded upon a certain claim asserted by the plaintiff should "stand and no new trial be had upon that issue," was held to have been warranted and the order that the finding for the defendant on a special issue should stand was held not to conflict with the order in regard to setting aside the general verdict. *Edwards v. Willey*, 363.

Setting aside verdict, see *infra*.

Setting aside by judge of his own finding, see *infra*.

"Finding."

The word "finding," used in a report of a judge of the Superior Court, was given its ordinary meaning of the ascertainment of a fact in a judicial proceeding. *Garden Cemetery Corp. v. Baker*, 339.

Setting aside by Judge of his own Finding.

A judge who has heard a case without a jury and, having ruled as matter of law that the plaintiff could not recover, has made a finding for the defendant, has power afterwards, of his own volition and without the making of any motion, to set aside his finding on the ground that it was erroneous in law and to order a new trial. *McKinley v. Warren*, 310.

R. L. c. 173, § 113, in regard to the granting of a new trial upon motion in cases heard by a judge without a jury, does not limit the power of a judge to set aside of his own volition any finding made by him. *Ibid*.

R. L. c. 173, § 112, in regard to the setting aside of verdicts in civil actions, has no application to the setting aside of the finding of a judge before whom a case was tried without a jury, the word "verdict" as used in the statute importing a trial by jury. *Ibid*.

Setting aside Verdict.

The provision of St. 1911, c. 501, that whenever a verdict is set aside and a new trial is granted, the judge "granting the motion for the new trial shall

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file a statement setting forth fully the grounds upon which the motion is granted," does not take away nor in any way diminish the discretionary power of a presiding judge to set aside a verdict on a motion in writing of a party filed under R. L. c. 173, § 112, and does not enlarge in any way the jurisdiction of this court to review the exercise of such discretionary power. *Edwards v. Willey*, 363.

This court, in considering whether the discretionary power of a presiding judge in setting aside a verdict was exercised properly, will consider only whether a careful examination of the reasons of the judge, filed in compliance with St. 1911, c. 501, discloses any abuse of judicial discretion or any overstepping the limits of his jurisdiction or failure to comply with the reasonable regulations of the statutes. *Ibid.*

Order, made after a verdict had been returned for a plaintiff in a large amount, that, unless the plaintiff should remit a substantial amount named, the verdict should be set aside and a new trial granted upon the question of damages only and also that a special finding of the jury that no damages should be awarded upon a certain claim asserted by the plaintiff should "stand and no new trial be had upon that issue," was held to have been warranted and the order that the finding for the defendant on a special issue should stand was held not to conflict with the order in regard to setting aside the general verdict. *Ibid.*

New Trial.

A judge who has heard a case without a jury and, having ruled as matter of law that the plaintiff could not recover, has made a finding for the defendant, has power afterwards, of his own volition and without the making of any motion, to set aside his finding on the ground that it was erroneous in law and to order a new trial. *McKinley v. Warren*, 310.

R. L. c. 173, § 113, in regard to the granting of new trials upon motion in cases heard by a judge without a jury, does not limit the power of a judge to set aside of his own volition any finding made by him. *Ibid.*

Under Rule 41 of the Superior Court the time for filing or giving notice of a motion for a new trial "may be extended" by the judge who presided at the trial, although the motion for such extension was made after the expiration of the three days after the verdict within which the rule requires that a motion for a new trial shall be filed. *Whitney v. Hunt-Spiller Manuf. Corp.* 318.

The provision of St. 1911, c. 501, that whenever a verdict is set aside and a new trial is granted, the judge "granting the motion for the new trial shall file a statement setting forth fully the grounds upon which the motion is granted," does not take away nor in any way diminish the discretionary power of a presiding judge to set aside a verdict on a motion in writing of a party filed under R. L. c. 173, § 112, and does not enlarge in any way the jurisdiction of this court to review the exercise of such discretionary power. *Edwards v. Willey*, 363.

Order, made after a verdict had been returned for a plaintiff in a large amount, that, unless the plaintiff should remit a substantial amount named, the verdict should be set aside and a new trial granted upon the question of damages only and also that a special finding of the jury that no damages should be awarded upon a certain claim asserted by the plaintiff should

"stand and no new trial be had upon that issue," was held to have been warranted and the order that the finding for the defendant on a special issue should stand was held not to conflict with the order in regard to setting aside the general verdict. *Edwards v. Willey*, 163.

Where the judge presiding at the trial of an action of law, by refusing, subject to exception by the plaintiff, to permit the plaintiff to present to the jury certain contentions which were open to him upon the pleadings and the evidence, and by refusing to give certain rulings of law, unduly narrows the issues to be presented to the jury, who find for the defendant, the plaintiff not only may present his contentions to this court by a bill of exceptions, but also may present them to the trial judge as the basis of a motion for a new trial. *Weil v. Boston Elevated Railway*, 397.

The question, whether, after a verdict for the defendant in an action at law, it was proper to grant a motion of the plaintiff for a new trial on the ground that rulings of the trial judge, refusing to permit the plaintiff to present certain contentions to the jury and to rule that such contentions were open to the plaintiff on the pleadings and the evidence, were erroneous, properly may be presented to this court by a report of the trial judge, in which he certifies that he is of the opinion that such question should be determined before further proceedings in the case. *Ibid*.

If a motion for a new trial, which is asked for on the grounds of alleged prejudicial conversations in the presence of the jury and of alleged improper conduct of the deputy sheriffs in charge of the jury and is supported by the affidavits of persons who have appeared as witnesses at the trial, is denied by the trial judge for the reason, stated by him, that he is not satisfied of the truth of the allegations contained in the motion, his decision will not be disturbed. *Damm v. Boylston*, 557.

Appeal from Police Court.

In a suit in equity to enforce an agreement by the defendant, made in consideration of the plaintiff releasing a claim of a mechanic's lien on real estate of the defendant upon the defendant giving him a bond without sureties for the payment of final judgment establishing his lien, that the defendant would not appeal from a judgment of a police court on a petition by the plaintiff for the enforcement of the lien, on an appeal from a final decree enjoining the defendant from prosecuting his appeal from, and ordering him to pay to the plaintiff the amount of, the judgment rendered on the petition to enforce the lien, it was held that the decree must be affirmed, because it did not appear that the findings of fact upon which it was founded were plainly wrong. *Palmer v. Lavers*, 286.

The provisions of R. L. c. 173, § 70, that "agreements of attorneys relative to an action or proceeding shall be in writing" in order to be of validity, has no effect upon an agreement, made by an owner of real estate through his attorney for a good consideration, to abide by the judgment of a police court on a petition thereafter to be filed for the enforcement of a mechanic's lien. *Ibid*.

Report.

The word "finding" used in a report of a judge of the Superior Court, was given its ordinary meaning of the ascertainment of a fact in a judicial proceeding. *Garden Cemetery Corp. v. Baker*, 339.

Construction of a report made by a judge of the Superior Court in a suit in equity brought by a private cemetery corporation for the removal of a cloud upon its title to its cemetery alleged to have been created by a sale for the collection of a tax for street watering purposes illegally assessed because the land had not been benefited by the watering of the streets, from which it was held that the judge found as a fact, in view of all the circumstances, that no benefit was received by the land from the street watering. *Garden Cemetery Corp. v. Baker*, 339.

In the foregoing case, the rescript directed that a decree be entered for the plaintiff, "unless within thirty days . . . on motion by the defendant to the judge who heard the case, further hearing is granted on the ground that the report previously made was not intended as a finding that as a fact the plaintiff's cemetery was not benefited by the street watering." *Ibid*.

The question, whether, after a verdict for the defendant in an action at law, it was proper to grant a motion of the plaintiff for a new trial on the ground that rulings of the trial judge, refusing to permit the plaintiff to present certain contentions to the jury and to rule that such contentions were open to the plaintiff on the pleadings and the evidence, were erroneous, properly may be presented to this court by a report of the trial judge, in which he certifies that he is of the opinion that such question should be determined before further proceedings in the case. *Weil v. Boston Elevated Railway*, 397.

Appeal.

An appeal from an order dismissing a petition for a writ of review under R. L. c. 193, § 22, brings up only matters of law apparent on the record. *Browne v. Fairhall*, 495.

Appeals under Workmen's Compensation Act, see that subtitle under WORKMEN'S COMPENSATION ACT.

Exceptions.

Form of bill: unnecessary and irrelevant matter.

In an action of tort for personal injuries, the bill of exceptions occupied one hundred and ninety-four pages of the printed record, of which one hundred and thirty pages contained testimony set forth in the form of questions and answers and it was said by SHELDON, J., that the exceptions ought not to have been presented by counsel nor allowed by the judge in that form. *Corsick v. Boston Elevated Railway*, 144.

It was intimated that, if the practice of presenting to this court unnecessarily and unreasonably voluminous bills of exceptions, calling "for undue effort on the part of the court to pick out the few important facts from the undigested mass of irrelevant and impertinent facts with which they are covered up," is persisted in, it may call for drastic action to be taken by this court of its own motion. *Romana v. Boston Elevated Railway*, 76.

Exceptions in cases tried together.

Where after a trial before a judge without a jury the plaintiff and the defendant each has filed a bill of exceptions which is allowed and the exceptions are heard together by this court, if neither bill states that it contains all the evidence and it is not certain that both bills contain all the material evidence, resort will be had by this court to both bills to ascertain the material facts. *McKinley v. Warren*, 310.

Construction of bill.

If, in taking an exception to a portion of a charge of a judge to a jury, no reference is made to the state of the pleadings as a basis of the exception, it is not open to the excepting party in this court to support the exception on that ground. *Kerr v. Shurtleff*, 167.

Where it appears by a bill of exceptions that a certain request for a ruling was refused in the terms asked for because the judge said that he had covered it in substance in his instructions to the jury, and the instructions given by the judge on this point are not stated, it must be assumed that they were correct and sufficient. *Batchelder v. Home National Bank of Milford*, 420.

Upon construction of a bill of exceptions in an action based upon a certain agreement for the conveyance of a "good and clear title" to certain land, free from all incumbrances, it was held that on the record it was not open to the plaintiff to contend that at the time when the deed was tendered to him no evidence was shown that the record title could be remedied, so that the ruling of the trial judge "would oblige a vendee either to accept the defective title or to assume the risk of removing the incumbrance or to forfeit his deposit." *Shanahan v. Chandler*, 441.

What is proper subject of exception.

The denial in an action at law of a motion by the defendant to amend his answer is wholly within the discretionary power of the presiding judge and is not open to exception. *Aronson v. Nuremberg*, 376.

Where the judge presiding at the trial of an action at law, by refusing, subject to exception by the plaintiff, to permit the plaintiff to present to the jury certain contentions which were open to him upon the pleadings and the evidence, and by refusing to give certain rulings of law, unduly narrows the issues to be presented to the jury, who find for the defendant, the plaintiff may present his contentions to this court by a bill of exceptions. *Weil v. Boston Elevated Railway*, 397.

Immaterial exceptions.

Where, upon an exception to the refusal of a presiding judge to make a ruling as to the legal effect of certain facts if they should be found by the jury, the evidence reported and described in the bill of exceptions does not warrant a finding of these facts by the jury, the exception must be overruled, because it does not appear that there was any occasion for the ruling requested. *Murphy v. O'Connell*, 105.

Correct ruling given for wrong reason.

If evidence, which was excluded by the presiding judge at a trial for a wrong reason, was irrelevant and ought to have been excluded, an exception to its exclusion will be overruled. *Young v. Duncan*, 346.

Whether error was prejudicial.

Exceptions by the defendant, at the trial of an action for personal injuries sustained while the plaintiff was using a path on premises of the defendant, where there was no evidence which would warrant a finding that the plaintiff was invited to use the path, but there was evidence tending to show that he was using it as a licensee of the defendant or as a trespasser and that the defendant was guilty of wanton, reckless and wilful misconduct toward him, were sustained because the jury might have found under the judge's

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instructions that the plaintiff was invited to use the path and was injured by negligence of the defendant which was not wanton, reckless or wilful misconduct. *Romana v. Boston Elevated Railway*, 76.

Instruction in the charge to the jury by the judge presiding at the trial of an action for deceit, which was held inapplicable to the evidence and harmful to an excepting party, even if correct as a statement of law, so that the exception must be sustained. *Kerr v. Shurtleff*, 167.

Admissions in evidence, at the trial of an action by a trustee in bankruptcy to recover the amount of an alleged unlawful preference, of the bankrupt's schedule of his debts and assets filed in the bankruptcy proceedings after the bankrupt had testified that his financial condition did not change materially from the time he made the payment alleged to be a preference to the time he filed the schedule, which it was held was merely a formal error and could not have affected injuriously the substantial rights of the parties within the meaning of St. 1913, c. 716, § 1. *Batchelder v. Home National Bank of Milford*, 420.

Certain error in the admission of irrelevant evidence which was held not to have been cured by instructions given to the jury, so that exceptions to its admission were sustained. *Hughes v. Williams*, 448.

Review.

See REVIEW.

PRACTICE, CRIMINAL.

Discontinuance.

A criminal proceeding *in rem* is not affected by a previous complaint under the same statute relating to the same matter which was dismissed by a district court for want of jurisdiction. *Commonwealth v. Intoxicating Liquors*, 602.

A criminal proceeding *in rem* under R. L. c. 100, § 48, for the forfeiture of certain intoxicating liquors, is not barred by a previous proceeding under the same statute, in which the prosecuting officer terminated the case by a discontinuance and an order was made for the return of the liquors followed by their delivery to the claimant. *Ibid.*

Failure of Defendant to Testify.

Remarks of the district attorney, at the trial of an indictment for larceny by false pretenses, respecting the failure of the defendants to testify, which were held to have gone rather far, but against which the rights of the defendants were fully protected by instructions of the judge. *Commonwealth v. Farmer*, 507.

Ordering Verdict.

An exception in a criminal case to a refusal of the presiding judge to instruct the jury that "upon all the evidence in the case the verdict must be not guilty" cannot be sustained if all the evidence is not reported or described and the bill of exceptions shows no error of law. *Commonwealth v. Segee*, 501.

Conduct of Trial.

Argument of district attorney.

Remarks of the district attorney, at the trial of an indictment for larceny by false pretenses, respecting the failure of the defendants to testify, which were held to have gone rather far, but against which the rights of the defendants were protected fully by instructions of the judge. *Commonwealth v. Farmer*, 507.

Judge's charge.

Certain instructions in the charge of the judge presiding at the trial of an indictment for larceny by false pretenses, relating to the burden of proof and the drawing of inferences, which, it was held, when taken in connection with the charge as a whole, were not too broad and were accurate as applied to the evidence and the issues. *Commonwealth v. Farmer*, 507.

Exceptions.

An exception in a criminal case to a refusal of the presiding judge to instruct the jury that "upon all the evidence in the case the verdict must be not guilty" cannot be sustained if all the evidence is not reported nor described and the bill of exceptions shows no error of law. *Commonwealth v. Segee*, 501.

In a criminal case, as in a civil one, exceptions to the admission or exclusion of evidence cannot be sustained, where all the evidence material to the exceptions is not reported nor described and it does not appear how the evidence in question applied to the case as it stood when such evidence was presented. *Ibid.*

PROBATE COURT.

Jurisdiction.

Under St. 1872, c. 370, (now included in R. L. c. 147, § 18,) the Probate Court was held to have had jurisdiction not only to empower trustees under a certain will who owned real estate, the buildings on which were destroyed in the great Boston fire of 1872, to mortgage the property for the purpose of paying the expense of erecting new buildings upon the premises, but also to order that twenty-five per cent of the net rents of the mortgaged estate be reserved for the payment of the principal of the mortgage note. *Long v. Simmons Female College*, 135.

The Probate Court was held to have had jurisdiction of such a petition, and a decree to that effect was held to be valid, although notice of the petition was given only by publication, and there were persons living who were life beneficiaries of the trust estate and whose children also might become beneficiaries. *Ibid.*

Facts which were held not consistent with a finding that a certain man's domicile at the time of his death was in the county in this Commonwealth in which he lived so that the Probate Court of that county had jurisdiction of a petition for the proof of his will, where it appeared that at one time he had had his domicile in a city in another State, had declared his purpose to give up his residence there and to establish his home in the city in this

Probate Court (*continued*).

Commonwealth and that this declared intention was manifested by unequivocal acts. *Emery v. Emery*, 227.

Evidence at Previous Trial.

Where, at the trial of an appeal from a decree of the Probate Court allowing a will, the contestants have made an attempt to show that the testimony of a certain witness for the executor differed from that which he had given in the Probate Court, the executor may be allowed to introduce evidence of the testimony given by the witness in the Probate Court for the purpose of showing that it was to the same effect as that given by him at the trial of the appeal. *Thomson v. Carruth*, 524.

Appeal.

A trustee under a will purporting to create a public charitable trust is a "person who is aggrieved," under the provisions of R. L. c. 162, § 9, by a decree of the Probate Court declaring the trust invalid, and may appeal therefrom although none of the trust provisions of the will are for his benefit. *Ripley v. Brown*, 33.

Where an appeal from a decree of the Probate Court admitting a will to probate was tried before a single justice of this court prior to the passage of St. 1913, c. 716, so that under the provision of § 6 of that statute an amendment to the petition for the proof of the will, for the purpose of correcting the record in a technical matter, could not be allowed by the full court, an order, which overruled exceptions to the rulings of the single justice, was made conditional upon the final allowance of the suggested amendment. *Thomson v. Carruth*, 524.

PROPRIETORS OF JEFFRIES NECK PASTURE.

In a suit in equity by the town of Ipswich against the Proprietors of Jeffries Neck Pasture and a certain grantee from that corporation, to set aside a deed against the authorization of which the plaintiff had not been permitted to vote as the holder of certain undrawn rights in the defendant corporation, conveyed to it in 1788 by the Commoners of Ipswich, it was held that the defendants were not in a position to assert that the plaintiff was estopped by a plea of the Commoners, in an action by another person in 1723, asserting that they had no right in the common land left undisposed of. *Ipswich v. Proprietors of Jeffries Neck Pasture*, 487.

In the same suit it was held that the relation of the defendant corporation to the owners of the undrawn rights, who were the owners in common of the land called Jeffries Neck Pasture, if not that of a trustee to *cestuis que trust*, was akin to that relation, and that the defendant corporation had not acquired by ouster or adverse possession any title to such undrawn rights against the plaintiff and accordingly the deed in question was set aside as not authorized by a vote of two thirds in number of the right owners. *Ibid.*

PROXIMATE CAUSE.

Evidence tending to show that the death of an employee resulted from blood poisoning caused by bedsores resulting from the employee's being required

to lie in one position in bed because of paralysis caused by a mortal injury arising out of and in the course of his employment was held to warrant a finding that the death resulted from the injury. *Burns's Case*, 8. And it was said, that, if the bed sore had been due to mistake or negligence on the part of the physicians acting honestly, this fact would not have been material, as it would not have broken the natural and probable connection between the injury and its consequences. *Ibid.*

PUBLIC RECORDS.

FORGING PUBLIC RECORD, see that title.

The valuation lists of the assessors of a town are "public records" within the meaning of R. L. c. 209, § 1. *Commonwealth v. Segee*, 501.

The provision of R. L. c. 175, § 74, that copies of official records of departments of the Commonwealth or of any city or town, authenticated by the attestation of the officer who has charge of them "shall be competent evidence in all cases equally with the originals thereof," does not render the originals themselves incompetent as evidence. *Ibid.*

RAILROAD.

See that subtitle under NEGLIGENCE.

RECEIVER.

Where a mortgagee under a trust mortgage of property of a street railway company purchased a tax title of certain land of the company and conveyed it to a receiver duly appointed of the property of the company, reserving "all other interests thereon now on record in" his name, and the receiver conveys all of the property of the company by a deed stating that the conveyance is subject to the mortgage, a title in the land free from the mortgage does not pass to the purchaser from the receiver because the receiver stood in the place of the company. *Federal Trust Co. v. Bristol County Street Railway*, 367.

REFERENCE AND REFEREE.

Because certain provisions of a contract in writing between two street railway companies, which related to ultimate liability for injuries caused by the running of cars of the first company upon the tracks and by the servants of the second company and required a reference of such matter to a referee, had not been complied with, it was held that one company could not maintain an action at law upon the contract to compel the other company to pay any portion of sums paid to it for injuries so caused, because to permit the maintenance of such an action would be to make a new contract for the parties and to substitute the court for the referee selected and agreed upon by them. *Old Colony Street Railway v. Brockton & Plymouth Street Railway*, 84.

RELEASE.

An instrument under seal, delivered to one of two joint tortfeasors in consideration of a sum of money paid by him to the person who suffered from the tort, whereby such person covenanted "to forever refrain from instituting, pressing or in any way aiding any claim, demand, action or causes of action for damages . . . for or on account or in any way growing out of" the tort, does not operate as a release of the injured person's cause of action against the other tortfeasor. *Johnson v. Von Scholley*, 454.

In an action for personal injuries against one of two joint tortfeasors, where there was in evidence an instrument which on its face was a covenant by the plaintiff not to sue the co-tortfeasor, it was held that further evidence offered by the defendant tending to show that negotiations which occurred between the plaintiff and the co-tortfeasor previous to the execution of the covenant were for the purpose of a settlement and discharge of the claim for damages alleged in the declaration should have been admitted, because the defendant, not being a party to the instrument in writing, had a right to show by oral evidence that it did not express the terms of the actual compromise. *Ibid*.

Transactions between the plaintiff in an action for conversion and a person, other than the defendant, who also might have been held liable for the conversion, which were held as a matter of law to constitute a loan to the plaintiff, and not a satisfaction of the claim or a transfer of title to the property from the plaintiff, and to afford no defense to the action. *Rosenberg v. National Dock & Storage Warehouse Co.* 518.

REPLEVIN.

Equitable replevin, see that subtitle under EQUITY JURISDICTION.

RES IPSA LOQUITUR.

See that subtitle under NEGLIGENCE.

REVERE.

In a suit in equity by the inhabitants of the town of Revere against the Revere Water Company, seeking to have declared void the contract of sale of the defendant's waterworks to the town which was held in *Seward v. Revere Water Co.* 201 Mass. 453, to have been authorized by the town and to be in accordance with its votes and with statutory authority, that decision was affirmed. *Revere v. Revere Water Co.* 161.

On findings made by a master, it was held that that contract was not made under any mutual mistake. *Ibid*.

It also was held that the fact, that the amount of the bonds to be issued in accordance with the contract was in excess of the debt limit of three per cent of the last tax valuation prescribed by R. L. c. 27, § 4, was not material, it appearing that it did not exceed the limit of ten per cent of that valuation

prescribed by R. L. c. 25, § 32, as to bonds issued for the purchase of such rights. *Revere v. Revere Water Co.* 161.

In the same suit it was held that the purchase by the town from the company was not consummated by the vote of the town, but only by the conveyance of the property to the town, so that until such conveyance the company was entitled to the net profit of its business and was not subject to certain provisions of the contract relating to amounts spent for new construction. *Ibid.*

REVIEW, WRIT OF.

An appeal from an order dismissing a petition for a writ of review under R. L. c. 193, § 22, brings up only matters of law apparent on the record. *Browne v. Fairhall*, 495.

A petition under R. L. c. 193, § 22, for a writ of review after final judgment is in effect a motion for a new trial after judgment and is addressed to the discretion of the trial court in which the judgment was rendered. *Ibid.*

Where, in an action of contract against an executor, the presiding judge refused to rule, as requested by the defendant, that the plaintiff could not recover because the contract was one to be performed only by the defendant's testator personally and did not bind the executor, and reported the case for determination by this court, who held that the ruling should have been given and under the terms of the report ordered judgment for the defendant, the defeated plaintiff cannot maintain a petition for a writ of review after the judgment in order to permit him to prove at a new trial that the contract was governed by the law of another State under which it was binding on the executor. *Ibid.*

In the above case it was said, that, if the evidence of the foreign law which the petitioner wished to present had been brought properly before this court, which it was not, it would not have been essentially at variance with the decision of this court in regard to the effect of the contract. *Ibid.*

RULES OF COURT.

The word "extend" when used in rules of court and statutes in relation to periods of time has been interpreted not to imply the existence of an unexpired portion of the period. *Whitney v. Hunt-Spiller Manuf. Corp.* 318.

Rule 41 of the Superior Court. *Ibid.*

Equity Rule 25. *Collins v. Snow*, 542.

SALE.

Conditional.

Under a certain contract of conditional sale in which the vendee agreed that the vendor "may cancel this contract any time prior to the acceptance of payment by an authorized collector of" the vendor, it was held that the vendor had a right to retake the goods upon tendering to the vendee the small sum which he had paid, and was not required to give the notice required by R. L. c. 198, § 13. *Drake v. Metropolitan Manuf. Co.* 112.

Evidence, at the trial of an action against a corporation for an assault and

battery alleged to have been committed by an agent of the defendant who on its behalf had delivered certain goods to the plaintiff upon a contract of conditional sale and who had committed the assault and battery in an effort to repossess the goods, upon which, it was held, the jury were warranted in finding that the defendant had ratified the acts of the agent. *Drake v. Metropolitan Manuf. Co.* 116.

At the trial of the same action, there being no evidence that the agent who committed the assault was a "collector," and it appearing that under the contract "collectors" only could receive payments after the first, it was held that the defendant was entitled to a ruling that under the terms of the contract the defendant had a right to cancel it when he did, because no payment excepting the first had been made to a collector. *Ibid.*

On Execution.

If a petitioner for the registration of the title to certain land purchased the land at a sale upon an execution issuing in an action in which it had been attached upon mesne process, and at the time of the sale the petitioner knew that before the attachment was made the debtor had delivered a deed of the land to another who had not recorded it, the title should not be registered unless the petitioner proves that at the time of the attachment the attaching creditor did not have knowledge of such a deed by the debtor. *Hughes v. Williams*, 448.

And, while at the trial of such an issue evidence is admissible as to conversations with and conduct on the part of the creditor before the attachment, tending to show such knowledge on his part, evidence of statements made by the creditor or his attorney after the attachment are irrelevant and inadmissible. *Ibid.*

SMALL LOANS ACT.

The provision of St. 1912, c. 675, § 5, amending the small loans act, St. 1911, c. 727, § 17, that "any loan made or note purchased, or indorsement or guarantee furnished by an unlicensed person . . . in violation of this act shall be void," does not make void in the hands of a *bona fide* purchaser a note given as collateral security for a note given in violation of the act. *Burnes v. New Mineral Fertilizer Co.* 300.

Application of the foregoing rule in an action against the maker and indorsers of a note so purchased in violation of the act, brought by one who, with notice of such violation, purchased it at a foreclosure sale under the terms of a collateral security note, to secure which the note in suit had been pledged by an associate of the unlicensed money lender to one who had no notice of the violation. *Ibid.*

STATUTE.

Construction.

A provision in a contract of conditional sale that the vendor might "cancel this contract any time prior to the acceptance of payment by an authorized collector of" the vendor, was held not to be an attempt to waive the provisions of R. L. c. 198, § 13, and to be valid. *Drake v. Metropolitan Manuf. Co.* 112.

Amendment.

The omission, in the codification of the railroad and street railway laws in St. 1906, c. 463, of the reference in R. L. c. 112, § 24, to c. 111, § 70, by which the Supreme Judicial Court was given exclusive jurisdiction of all questions arising out of street railway mortgages, is significant of a legislative purpose to change the law; and, since such codification, the court of appropriate jurisdiction of a suit to foreclose a trust mortgage upon the property of a street railway company is to be determined apart from any express statute. *Federal Trust Co. v. Bristol County Street Railway*, 367.

Repeal.

St. 1904, c. 320, relating to the venue of actions to recover for damages resulting from negligence, repealed inconsistent provisions of R. L. c. 189, §§ 1, 2, relating to the venue of actions brought by trustee process. *Sandler v. Boston Elevated Railway*, 333.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 745.

STREET RAILWAY.

The omission, in the codification of the railroad and street railway laws in St. 1906, c. 463, of the reference in R. L. c. 112, § 24, to c. 111, § 70, by which the Supreme Judicial Court was given exclusive jurisdiction of all questions arising out of street railway mortgages, is significant of a legislative purpose to change the law; and, since such codification, the court of appropriate jurisdiction of a suit to foreclose a trust mortgage upon the property of a street railway company is to be determined apart from any express statute. *Federal Trust Co. v. Bristol County Street Railway*, 367.

The Superior Court has jurisdiction of a suit in equity to foreclose a trust mortgage upon the property of a street railway company in this Commonwealth. *Ibid.*

In a suit in equity for the foreclosure of a certain trust mortgage upon the property of a Massachusetts street railway company, which had been sold by a receiver by judicial sale to persons who formed a new corporation to take it over, it was held that, on the facts appearing, the new corporation was estopped to deny the validity of the mortgage on the ground that there were fatal defects in the organization of the original company. *Ibid.*

In the above suit it also was held, that, because of the explicit nature of the

decree as to the mortgage, a provision in the decree of the United States Circuit Court giving the receiver power to sell, in substance that the sale should be subject, not only to the mortgage in question, but also to other ordinary liens, and that the purchaser should have the right to contest the establishment of such liens, could not be construed as giving to the new company a right, after the sale and conveyance to it under the circumstances above described, to contest the validity of the mortgage. *Federal Trust Co. v. Bristol County Street Railway*, 367.

It also was held, that the issuing of the new bonds in substitution for those originally issued did not invalidate the mortgage. *Ibid*.

Where a mortgagee under a trust mortgage of property of a street railway company purchased a tax title of certain land of the company and conveyed it to a receiver duly appointed of the property of the company, reserving "all other interests thereon now on record in" his name, and the receiver conveys all of the property of the company by a deed stating that the conveyance is subject to the mortgage, a title in the land free from the mortgage does not pass to the purchaser from the receiver, because the receiver stood in the place of the company. *Ibid*.

See also that title under NEGLIGENCE.

STRIKE.

Where a strike committee, organized for the purpose of supporting a strike of many thousands of operatives in a textile manufacturing centre and also for the support of those strikers who are in suffering and want, in response to an appeal issued by them for money with which to relieve such want, receives a large fund for that purpose, those members of such committee who become the custodians and managers of the fund are under the same obligations as to the fund as if they expressly had been made trustees thereof. *Attorney General v. Bedard*, 378.

And therefore they must account for the fund and can be credited in the accounting only with disbursements made for the purpose of the trust; they must be charged with everything for which they do not properly account; they are bound to keep the fund distinguished from other moneys in their hands, and the consequences of any failure on their part to keep it so distinguished must fall upon themselves. *Ibid*.

If the custodians and managers of such fund deliver to the chairman of their committee, who is not a custodian or manager but who was present during a large part of the strike and was the secretary of a national organization of the strikers, checks on the funds in a bank which are payable to third persons and which he knows are to be used for other purposes than those for which the fund was given, and such member receives the checks and delivers them to the payees, who thereupon receive the amount thereof, he is jointly responsible with the custodians and managers for the amount of those checks. *Ibid*.

Suit by the Attorney General, at the relation of some contributors to a fund received by a committee of strikers, to enforce by an information in equity the application of the funds so raised to the charitable purposes for which they were contributed. *Ibid*.

See also LABOR UNION.

SUPERIOR COURT.

Under R. L. c. 173, § 48, the Superior Court has no power to allow a plaintiff to amend his declaration by adding to it a cause of action that could not have been intended when the writ was sued out. *Church v. Boylston & Woodbury Cafe Co.* 231.

The Superior Court has jurisdiction of a suit in equity to foreclose a trust mortgage upon the property of a street railway company in this Commonwealth. *Federal Trust Co. v. Bristol County Street Railway*, 367.

The Superior Court was held to be "a court of last resort" for an action for personal injuries, within the meaning of those words as used in a policy of insurance against liability. *Tighe v. Maryland Casualty Co.* 463.

SUPREME JUDICIAL COURT.

Where the justices of this court have given their opinions, under c. 3, art. 2, of the Constitution, that a certain statute, if enacted, would be constitutional, and the statute itself afterward comes before the court in a judicial controversy in which the question of the constitutionality is raised and is argued by counsel, the question is treated as an open one. *Young v. Duncan*, 346.

Where an appeal from a decree of the Probate Court admitting a will to probate was tried before a single justice of this court prior to the passage of St. 1913, c. 716, so that under the provision of § 6 of that statute an amendment to the petition for the proof of the will, for the purpose of correcting the record in a technical matter, could not be allowed by the full court, an order, which overruled exceptions to the rulings of the single justice, was made conditional upon the final allowance of the suggested amendment. *Thomson v. Carruth*, 524.

SURETY.

Liability of a surety on a bond given to dissolve an attachment in a proceeding in the Probate Court on a petition of a wife for separate support. *Maloof v. Abdallah*, 21.

A contractor for the performance of certain public work for a city having furnished by his contract with the city what was held to have been sufficient security to satisfy the requirements of St. 1909, c. 514, § 23, a surety company bond, with a condition to the effect that the contractor should "faithfully furnish the material and do the work required of him by the contract," was held to be of no benefit, and to furnish no remedy, to creditors to whom, for materials furnished in the performance of the contract, balances were owed by the contractor, who had become bankrupt. *Hunter v. Boston*, 535.

Where a surety company gave to a city such a bond, and the contractor by his failure to comply with the terms of the contract caused the amount which would have been due to him upon his full performance of the contract to be diminished by a certain sum of money, which was less than the amount withheld by the city from the contractor under the terms of the contract, the surety company owes nothing to the city upon its bond. *Ibid.*

SURVIVAL OF ACTIONS OR SUITS.

An original order for the payment of the additional compensation under the workmen's compensation act, which is provided by St. 1911, c. 751, Part II, § 11, as amended by St. 1913, c. 696, for a total or partial loss, or permanent incapacity of certain members of the body of an employee, cannot be made after the employee's death. *Burns's Case*, 8.

Whether, where under the provisions of the workmen's compensation act an injured employee upon his own application has been awarded during his lifetime a specific compensation for a stated number of weeks for incapacity to work and his death occurs before the expiration of the period, the right thus adjudicated ceases at his death, or whether the payments must be continued until the end of the appointed time, was referred to as a question that was not passed upon. *Ibid.*

TAKING.

See EMINENT DOMAIN.

TAUNTON AND PAWTUCKET STREET RAILWAY COMPANY.

Suit to foreclose a trust mortgage on street railway property formerly owned by the Bristol County Street Railway Company and later conveyed by receivers of that company to persons who conveyed it to the Taunton and Pawtucket Street Railway Company. *Federal Trust Co. v. Bristol County Street Railway*, 367.

TAX.

Assessment.

Where property of a person has been assessed for taxation as of April 1 of a certain year, the power of the assessors to increase the assessment for that year on account of property that has been omitted from the annual assessment, given by St. 1909, c. 490, Part I, § 85, as amended by St. 1911, c. 89, is confined to the period of eleven days there prescribed and cannot be exercised after December 20 of the year in question. *Gannett v. Cambridge*, 60.

Therefore an attempt by the assessors to increase such an assessment in May of the following year, upon a recommendation by the tax commissioner under St. 1910, c. 260, of a revision of the valuation of the property, is void. *Ibid.*

St. 1910, c. 260, giving the tax commissioner power to recommend to boards of assessors a revision of the valuation of property, did not repeal or amend St. 1909, c. 490, Part I, § 85, which required that an additional assessment by assessors upon property omitted from the regular assessment should be made between the fifteenth and twentieth days of December next ensuing. *Ibid.*

And by St. 1911, c. 89, such an additional assessment must be made "between the tenth and twentieth days, both inclusive, of December next ensuing." *Ibid.*

The valuation lists of the assessors of a town are "public records" within the meaning of R. L. c. 209, § 1, which makes it a crime to forge a public record with intent to injure or defraud. *Commonwealth v. Foz*, 501.

Determination of questions which arose at the trial of an indictment for forging such public records. *Ibid*.

Succession.

Where one who is the donee of a power of appointment over property, held by trustees under the will of the donor who were appointed by a probate court of this Commonwealth, dies domiciled in another State and exercises that power by making an appointment by will, so much of the trust property as consists of shares of stock of corporations incorporated by States other than this Commonwealth is not subject to a succession tax under St. 1909, c. 490, Part IV, § 1; c. 527, § 8, although the certificates for the shares are in this Commonwealth. *Clark v. Treasurer & Receiver General*, 292.

Assessment for Street Watering.

A private cemetery corporation is subject to a tax assessed upon its cemetery under R. L. c. 26, §§ 26, 27, for street watering if the amount of the tax assessed upon the property is not in excess of the benefit conferred upon the property by the street watering. *Garden Cemetery Corp. v. Baker*, 339.

It cannot be said as a matter of law that the real estate of a private cemetery corporation is not benefited by the watering of streets adjacent to the cemetery. *Ibid*.

In a suit in equity involving the question, whether a tax for street watering assessed to a private cemetery corporation upon its cemetery is a legal assessment, where there is no question as to the propriety of the amount of the tax, the question, whether a benefit was conferred upon the cemetery by the street watering, is one of fact to be determined upon the evidence. *Ibid*.

In the above case a finding, which was construed to be that no such benefit was conferred, was held not to have been clearly wrong. *Ibid*.

Excise on Foreign Corporations.

The constitutionality of the excise imposed by St. 1909, c. 490, Part III, § 56, on certain foreign business corporations having usual places of business in this Commonwealth was referred to as already established and was reaffirmed. *Marconi Wireless Telegraph Co. v. Commonwealth*, 558.

Under § 70 of the above statute, providing that a foreign business corporation aggrieved by the exaction of an excise may, within six months after the payment of such excise, maintain a petition for the purpose of showing that such excise should not have been exacted, which shall be its exclusive remedy, such a foreign corporation is not deprived of this remedy by reason of its compliance with the requirements imposed by the statutes of this Commonwealth on foreign corporations doing business here. *Ibid*.

The foregoing statute does not apply to a foreign corporation having its place of business here only for use in interstate commerce, and there is no distinction in this regard between a corporation doing a commercial or trading business and one engaged in the business of transportation. *Ibid*.

Tax (continued).

A foreign corporation is subject to such excise when it transacts in this Commonwealth domestic business substantial in its essence and reasonably susceptible of separation from the corporation's interstate commerce. *Marconi Wireless Telegraph Co. v. Commonwealth*, 558.

The mere fact that a foreign corporation may not be able to make profits enough on its domestic business transacted in this Commonwealth to meet such excise does not make the law unconstitutional as to that corporation nor exempt the corporation from the excise. *Ibid.*

A corporation, organized under the laws of another State, which maintains in this Commonwealth stations for the purpose of transmitting and receiving for hire wireless electric messages to and from ships on the high seas and foreign countries, and which neither transmits nor receives any messages overland or in or through this Commonwealth, is engaged exclusively in foreign commerce and accordingly is not subject to such excise. *Ibid.*

A certain corporation, organized under the laws of another State, whose business, so far as this Commonwealth is concerned, consisted of selling by contracts made in New York coal bought in other States to customers in the New England States and arranging for its transportation to them over the high seas or by rail from the State of Virginia was held to have been engaged exclusively in carrying on commerce "among the several States" and accordingly is not subject to such excise. *Ibid.*

A certain Connecticut manufacturing and trading corporation, which maintains an office in Boston, with one permanent office salesman and four travelling salesmen who travel throughout New England, where a stock of samples is kept and where sales are made by sample to customers, was held to be maintaining a place of business in this Commonwealth not used exclusively for interstate commerce and to be subject to the excise. *Ibid.*

A certain Virginia manufacturing and trading corporation, which maintains an office in Boston, where there are a manager, an office manager and four inspectors, all of whom act as salesmen and sell machines on orders which become operative on acceptance at the office in Pennsylvania, and where also a stock to replace and repair broken parts of machines is kept constantly on hand, was held to be conducting a local business wholly distinct from its interstate business and accordingly to be subject to the excise. *Ibid.*

A certain West Virginia corporation manufacturing and trading in automobiles and occupying in Boston a large building as an office, salesroom and repair shop, was held to be conducting a local and domestic business that is separate and distinct from its interstate business, and accordingly to be subject to the excise. *Ibid.*

A foreign flour manufacturing corporation, which maintains a Boston office that has charge of the business of the corporation in New England and a part of New York, where sixteen travelling salesmen are employed, seven of whom are devoted to the Massachusetts trade and all of whom, although paid by the corporation, act as agents for the domestic wholesalers in soliciting orders from domestic retailers, the corporation also keeping on hand in Boston a small stock from which it makes sales for delivery in Massachusetts, was held to be subject to the excise. *Ibid.*

It also was held that the motive which influences the corporation in undertaking the business of providing agents for the wholesalers and the fact

that a natural result of this business may be to increase the corporation's sales to the wholesalers are immaterial circumstances. *Marconi Wireless Telegraph Co. v. Commonwealth*, 558.

- A corporation, organized under the laws of Michigan as a holding company, with its business office at Boston, was held under the circumstances to be a foreign business corporation having a usual place of business in this Commonwealth and to be subject to the excise. *Ibid.*
- A certain Michigan mining corporation, having its business office outside of Michigan at Boston, was held to be transacting business in this Commonwealth which is not interstate commerce and accordingly to be subject to the excise. *Ibid.*
- A corporation, organized in another State to manufacture and sell automobiles and there maintaining its factory, which has a local and domestic business in this Commonwealth, is none the less subject to such excise because after 1903 (when St. 1903, c. 437, § 75, was in force) and before the passage of the statute of 1909, which made the excise more onerous, it bought land in Boston and built on it a large building of steel, brick and concrete especially adapted for use as a garage, this not being an acquisition of permanent property which would make the imposition of the additional excise unconstitutional as a denial of equal protection of the laws within the principle of *Southern Railway v. Greene*, 216 U. S. 400. *Ibid.*

Exemption.

It seems, that a corporation, which has no capital stock and is not conducted for profit, no part of the income or profits of whose business can be distributed among members or stockholders, and the object of which is to provide wholesome and sanitary homes for working people and people of small means at moderate cost, is a charitable corporation within the meaning of St. 1909, c. 490, Part I, § 5, cl. 3. *Charlesbank Homes v. Boston*, 14.

But, if it erects on a lot of land belonging to it a large model apartment house, containing besides some general rooms one hundred and three apartments of two, three and four rooms respectively, and these apartments are leased to tenants for small rents, the net income being applied to the charitable purposes of the corporation, the real estate is not "occupied" by the corporation or its officers for the purposes for which it is incorporated within the meaning of St. 1909, c. 490, Part I, § 5, cl. 3, and consequently is not exempt from taxation. *Ibid.*

The exemption of cemeteries from general taxation by St. 1909, c. 490, Part I, § 5, cl. 8, does not exempt them from local assessments for special advantages arising out of public improvements. *Garden Cemetery Corp. v. Baker*, 339.

Sale.

Where a mortgagee under a trust mortgage of property of a street railway company purchased a tax title of certain land of the company and conveyed it to a receiver duly appointed of the property of the company, reserving "all other interests thereon now on record in" his name, and the receiver conveys all of the property of the company by a deed stating that the conveyance is subject to the mortgage, a title in the land free from the mortgage does not pass to the purchaser from the receiver because the receiver stood

Tax (*continued*).

in the place of the company. *Federal Trust Co. v. Bristol County Street Railway*, 367.

TOWNS.

See MUNICIPAL CORPORATIONS.

TREE.

It seems that the branches of a tree that overhang the land of a person other than the owner of the land in which the tree is growing may be cut off by such other owner to the extent that they overhang his land, but that, if he does not exercise this right, the product of the branches belongs to the owner of the trunk of the tree, who also must keep such branches from creating a nuisance. *Philbin v. Marlborough Electric Co.* 394.

TRESPASS.

Rights of one injured while a trespasser, see NEGLIGENCE, *Trespasser*.

TRUST.

What constitutes.

Whether a corporation, which in compliance with an order of court has deposited the amount of certain unclaimed dividends in a separate fund apart from its other assets, holds the fund in trust for the payment of such dividends when properly claimed so that, until the trust is repudiated or the right of a claimant is denied, the statute of limitations does not begin to run against such claimant, was mentioned as a question which was not passed upon in *Boston & Roxbury Mill Corp. v. Tyndale*, 425.

In a suit in equity by the Town of Ipswich against the Proprietors of Jeffries Neck Pasture and a certain grantee from that corporation to set aside a deed against the authorization of which the plaintiff, as the holder of certain undrawn rights in the corporation, had not been permitted to vote, it was held that the relation of the defendant corporation to the owners of the undrawn rights, who were the owners in common of the land called Jeffries Neck Pasture, if not that of a trustee to *cestuis que trust*, was akin to that relation, and that the defendant corporation had not acquired by ouster or adverse possession any title to such undrawn rights against the plaintiff, and the deed in question was set aside as not authorized by a vote of two thirds in number of the right owners. *Ipswich v. Proprietors of Jeffries Neck Pasture*, 483.

Fund raised for Charitable Relief.

Where a committee, organized for the purpose of supporting a strike of many thousands of operatives in a textile manufacturing centre and also for the support of those strikers who are in suffering and want, in response to an appeal issued by them for money with which to relieve such want, receives a large fund for that purpose, those members of such committee who become the custodians and managers of the fund are under the same obligation as

to the fund as if they expressly had been made trustees thereof. *Attorney General v. Bedard*, 378.

And therefore they must account for such fund and can be credited in the accounting only with disbursements made for the purposes of the trust; they must be charged with everything for which they do not properly account; they are bound to keep the fund distinguished from other moneys in their hands, and the consequences of any failure on their part to keep it so distinguished must fall upon themselves. *Ibid*.

Validity: Rule against Perpetuities.

Certain provisions of a will providing for the creation of a fund in the hands of trustees to be used to build and maintain a temple devoted to non-sectarian worship of Christ or for an "Industrial school and home," in which the teachings of Christ were to be taught, to be maintained for poor young men who should "show evidence of their worthiness satisfactory to the Trustees," or if, when the sum of \$100,000 was accumulated, there was no "spirit or desire among the people" for either the temple or the school and home, to be devoted to "the deserving poor of" Boston, were held to constitute a valid public charity, and not to be subject to the rule against perpetuities. *Ripley v. Brown*, 33.

Construction.

Upon the construction of the provisions of a will made in 1879 creating a trust and containing the words: "And it is my wish to establish this trust to continue during the lives of my wife, my two sons and my daughters, M and C, and during the life of the longest liver of them," it was held that it was the evident intention of the testator that the trust should not be terminated until the death of all his children. *Turnbull v. Whitmore*, 210.

Where trustees under a will, which placed "a sufficient sum in trust to invest to pay to" one F \$1,200 a year during her life, and, "at her decease," ordered the principal, "required to provide this annuity . . . to be added" to a trust fund for a niece, received from the executor \$32,000 as a principal sum sufficient in the exercise of a wise and conservative judgment to provide the \$1,200 a year for F, it was held that all that was given to F was an annuity of \$1,200; that the entire principal belonged on the death of F to the trustees for the niece; and that the excess income, not being disposed of by the will, should be paid to the administrator with the will annexed of the estate of the testator not already administered, to be distributed in accordance with the provisions of a residuary clause of the will. *Welch v. Hill*, 327.

In a will in which, after provisions relating to a trust for the benefit of a sister and her children, the testator directed that on the death of any child of the sister without issue, "the portion of one so dying shall revert and become part of the residue of" the estate, discharged of the trust, and gave the residue "to my brothers and sisters before mentioned and their heirs," the words "and their heirs" were held to be words of limitation intended to show that the gift made was an absolute one to the brothers and sisters named so that the interest there given vested in the brothers and sisters at the death of the testator. *State Street Trust Co. v. Morris*, 429.

Trustee's Duties and Liabilities.

Trustees of a fund set apart to pay a certain annuity should keep separate accounts of the principal and of the accumulation of excess income. *Welch v. Hill*, 327.

Where a committee organized for the purpose of supporting a strike of many thousands of operatives in a textile manufacturing centre and also for the support of those strikers who are in suffering and want, in response to an appeal issued by them for money with which to relieve such want, receives a large fund for that purpose, those members of such committee who become the custodians and managers of the fund are under the same obligation as to the fund as if they expressly had been made trustees thereof. *Attorney General v. Bedard*, 378.

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If the custodians and managers of such fund deliver to the chairman of their committee, who is not a custodian or manager but who was present during a large part of the strike and was the secretary of a national organization of the strikers, checks on the funds in a bank which are payable to third persons and which he knows are to be used for purposes other than those for which the fund was given, and such member receives the checks and delivers them to the payees, who thereupon receive the amount thereof, he is jointly responsible with the custodians and managers for the amount of those checks. *Ibid.*

Mortgage of Trust Estate.

Jurisdiction of the Probate Court to grant to trustees power to mortgage real estate under R. L. c. 147, § 18. *Long v. Simmons Female College*, 135.

Trustee's Right to Appeal.

A trustee under a will purporting to create a public charitable trust is a "person who is aggrieved," under the provisions of R. L. c. 162, § 9, by a decree of the Probate Court declaring the trust invalid, and may appeal therefrom although none of the trust provisions of the will are for his benefit. *Ripley v. Brown*, 33.

Termination.

In a certain suit in equity by a trustee under a will for instructions, it was held that, as to a fund in the hands of the trustee which should be distributed in accordance with the residuary clause of the will, the executor's accounts being fully settled, it was not necessary that an administrator *de bonis non* be appointed, but that the trustee should make the distribution. *State Street Trust Co. v. Morris*, 429.

TRUSTEE PROCESS.

The interest of one of the tenants in common of certain real estate, which was sold by a commissioner appointed by the Probate Court under R. L. c. 184,

§§ 31, 47, to make partition of it, in the proceeds from the sale of such real estate in the hands of the commissioner is not subject to attachment by trustee process. *Travelers Ins. Co. v. Maguire*, 360.

Since St. 1904, c. 320, an action against a city, town, person or corporation to recover for injury or damage received in this Commonwealth by reason of negligence cannot be brought in any county other than the county in which the plaintiff lives or has his usual place of business or in the county in which the alleged injury or damage was received, even though it be brought by trustee process and a trustee named in the writ has a usual place of business in such other county. *Sandler v. Boston Elevated Railway*, 333.

UNION.

LABOR UNION, *see* that title.

UNITED STATES COURTS.

The United States courts have not exclusive jurisdiction of a suit in equity founded on an alleged breach of a contract in writing to pay a stipulated royalty on the selling price of an appliance patented by the plaintiff and manufactured and sold by the defendant under an exclusive license from the plaintiff, even where the validity of a patent incidentally is drawn in question. *Potterton v. Condit*, 216.

UNLAWFUL ARREST.

In an action against a corporation for unlawfully causing the arrest of the plaintiff in a civil action upon a false affidavit of the defendant's president that the plaintiff was about to leave the Commonwealth, it was held that on the facts the plaintiff was entitled to have the jury instructed that, if a certain report of the agent of the defendant's president that the plaintiff was about to leave the Commonwealth was false, the agent's knowledge of its falsity was imputable to the defendant, and that, if the defendant acted on the advice of counsel in making the arrest, but had failed to disclose to its counsel the true conversation between the defendant's agent and the plaintiff, its acting upon the advice of counsel was no defense. *Cotter v. Nathan & Hurst Co.* 315.

It was also held in the same action that the jury should have been instructed that, if a rational person, having the knowledge that the defendant had through its president and its agent, would not have had reasonable cause (as defined by the judge) to believe that the plaintiff intended to leave the Commonwealth, then, if the other material facts were proved, the plaintiff might recover. *Ibid.*

UNLAWFUL INTERFERENCE.

Suit in equity to enjoin unlawful interference by a labor union with the plaintiff's business, and a boycott, *see* EQUITY JURISDICTION, *To enjoin Unlawful Interference.*

VENUE.

See that subtitle under PRACTICE, CIVIL.

VERDICT.

See that subtitle under PRACTICE, CIVIL.

VOLUNTARY ASSOCIATION.

A bill in equity cannot be maintained by a voluntary unincorporated association in the name of the association. *Herbst v. Fidelia Musical & Educational Corp.* 174.

In the above suit, the association being described as composed of three individuals "and many other members too numerous to mention," the bill was treated as if it had been brought by those individuals suing in behalf of themselves and of all the other members of the association. *Ibid.*

WAIVER.

The filing in the Probate Court in behalf of a surviving husband of a certain writing withdrawing all objection to proof of the instrument presented was held not to deprive such husband of his right under R. L. c. 135, § 16, to file in the registry of probate a writing waiving the provisions made for him in the will and claiming such portion of his wife's estate as he would have taken if she had died intestate. *McGrath v. Quinn*, 27.

A provision in a contract of conditional sale that the vendor might "cancel this contract any time prior to the acceptance of payment by an authorized collector of" the vendor, was held not to be an attempt to waive the provisions of R. L. c. 198, § 13, and to be valid. *Drake v. Metropolitan Manuf. Co.* 112.

Where one, who was induced by the deceit of another to lend him money and to receive as security shares of stock far less in value than what he was led by the deceit to think they were, upon discovering the fraud did not rescind the contract but retained the collateral and received substantial sums as interest, he was held to have affirmed the contract, but not to have waived his right of action for deceit. *McKinley v. Warren*, 310.

Acts of the plaintiff in an action of tort, in which he has claimed a trial by jury and the defendant has filed a plea in abatement, which were held to have constituted a waiver of his right to have the question of fact raised by the plea passed upon by a jury, no question in regard to his constitutional right to a trial by jury being involved. *Young v. Duncan*, 346.

Waiver by an employee of a subscriber under the workmen's compensation act of his right to damages in an action at common law. *Ibid.*

WAREHOUSEMAN.

Whether a warehouseman, whose agent has authority to issue receipts on the delivery of goods to the warehouseman and who issues a receipt for goods

which the warehouseman never received, may be made liable upon such instrument if the warehouseman was negligent in the way in which he allowed such agent to conduct his business in regard to the issuing of receipts, was mentioned as a question not passed upon in *Rosenburg v. National Dock & Storage Warehouse Co.* 518.

Construction of the provision of the warehouse receipts act, St. 1907, c. 582, § 21. *Ibid.*

WAREHOUSE RECEIPTS ACT.

The provision of the warehouse receipts act, St. 1907, c. 582, § 21, that "a warehouseman shall be liable to the holder of a receipt for damages caused by the non-existence of the goods," does not undertake to define the holder of a receipt. *Rosenburg v. National Dock & Storage Warehouse Co.* 518.

Nor does such provision change the rule established in this Commonwealth by *Sears v. Wingate*, 3 Allen, 103, that a principal, whose agent has authority to issue receipts on the delivery of goods to the principal, is not bound by a receipt issued by such agent for goods which have not been delivered to the principal. *Ibid.*

WATERCOURSE AND WATER RIGHTS.

Under St. 1892, c. 421, § 1, authorizing the city of Cambridge to take land and certain rights for a distributing reservoir, that city had no right to acquire or divert any part of underground waters which were the source of a natural stream, at least so far as such acquisition was not necessarily incident to the proper construction and use of its distributing reservoir and of the pipes leading into and out of such reservoir. *Hittinger Fruit Co. v. Cambridge*, 220.

In a suit in equity by a fruit grower, through whose land a natural brook flowed, against a city that without authority had diverted the waters of the brook in taking the land that contained the source of the brook for the construction of a distributing reservoir, a decree is proper which orders the defendant either to cease to interfere with the natural flow of the brook as it was when the defendant began the construction of its reservoir, or else to deliver daily into the brook not less than the number of gallons of water which was the average daily flow of the brook in its natural condition. *Ibid.*

And it is not a valid objection to such decree, that the natural flow of the brook varied and was uncertain in amount from time to time and that the plaintiff was entitled only to a variable supply of water. *Ibid.*

Acts of a town in the diverting of waters from a mill pond without the taking of any land of the owner of the mill pond or the filing of a certificate of taking of the waters, which were held to be capable of justification only on the assumption that the town took the waters by right of eminent domain for its water supply. *Spaulding v. Plainville*, 321.

In the same case the owner of the mill pond therefore was allowed to maintain a petition for the assessment of his damages. *Ibid.*

Such a petition is brought within the two years' period of limitation from the time of the taking provided by the statute, if it is brought within two years from the time of the driving of permanent wells, although, more than two years before it was brought, temporary test wells had been driven by the town. *Ibid.*

WATERWORKS.

Suit to have declared void a certain contract of sale of the waterworks of the Revere Water Company to the town of Revere was dismissed. *Revere v. Revere Water Co.* 161.

It also was held that the fact, that the amount of bonds to be issued in accordance with the contract was in excess of the debt limit of three per cent of the last tax valuation prescribed by R. L. c. 27, § 4, was not material, it appearing that it did not exceed the limit of ten per cent of that valuation prescribed by R. L. c. 25, § 32, as to bonds issued for the purchase of such rights. *Ibid.*

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WILL.

Execution.

If a person, who intends to execute an instrument as his will, after placing his signature for the purpose of identification on the margin of each of the first four pages of the instrument, proceeds in the presence of three witnesses to sign his name on the margin of the fifth page, intending it as the signature

of his will, and thereupon the three witnesses sign the attesting clause prepared for them, this is a valid execution and attestation of the will, the effect of which is not impaired by the testator afterwards recalling the witnesses and in their presence signing his name at the end of the *in testimonium* clause without any further signing by the witnesses, such later signature of the testator being no part of his will. *Thomson v. Carruth*, 524.

At the trial, upon an appeal from a decree of the Probate Court allowing a will, of the issue, "Was the alleged will now offered for probate executed according to law?" the executor may introduce evidence in addition to proof of signature, for the purpose of showing that the alleged testator signed the instrument *animo testandi*, to the effect that immediately after the signing of the instrument on the margin of the fifth page an indorsement was made on a former will stating that it was cancelled. *Ibid*.

Attestation.

Under R. L. c. 135, § 1, a will is not attested lawfully by a subscribing witness, if the person who intended and attempted to execute the instrument as his will concealed his signature from the subscribing witness so that he could not see it or know that it was there. *Nunn v. Ehlert*, 471.

Disqualification of Attesting Witness.

Under R. L. c. 135, § 1, which requires that a will should be attested "by three or more competent witnesses," if an instrument presented for proof as a will contains a bequest of \$300 to a church on the condition that it be "applied to the reduction of the present mortgage on the property of said church," a person who is one of the guarantors of the mortgage note given by the church is not a competent witness to the will, although the amount due on the note is small and is exceeded greatly by the value of the mortgaged property. *Crowell v. Tuttle*, 445.

Rules of Construction.

In case of irreconcilable differences between provisions in a will, a clear and unambiguous provision, coming later in the will, controls, as being more likely to express the final purpose of the testator. *Turnbull v. Whitmore*, 210. Construction of specific provisions, see DEVISE AND LEGACY.

WIRES.

Action for death caused by coming in contact with electric wires in a tree. *Philbin v. Marlborough Electric Co.* 394.

WITNESS.

Contradiction.

Where a conductor of a street railway company, called to testify for the plaintiff in an action for personal injuries, is asked whether he had made any

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report about a certain car and answers that he does not remember, the plaintiff cannot introduce in evidence under R. L. c. 175, § 24, for the purpose of contradicting him, evidence tending to show that he had made such a report, or that on a previous occasion he had stated that he had done so. *Corsick v. Boston Elevated Railway*, 144.

Where, in an action of contract, the personal relations of the parties were material, the defendant was allowed to testify in direct examination in contradiction of testimony previously given by the plaintiff when called as a witness by the defendant, the subject matter of the question being material. *Revel v. Vein*, 297.

Whether, if the subject matter had been immaterial, the testimony might have been admitted by the judge in the exercise of his discretion, was not decided. *Ibid.*

Self-contradiction.

Contradictory statements of witnesses which were held to raise questions for the jury. *Kane v. Boston Elevated Railway*, 101; *Kerr v. Shurtleff*, 167; *Hooper v. Bay State Street Railway*, 251.

Corroboration.

Where, at the trial of an appeal from a decree of the Probate Court allowing a will, the contestants have made an attempt to show that the testimony of a certain witness for the executor differed from that which he had given in the Probate Court, the executor may be allowed to introduce evidence of the testimony given by the witness in the Probate Court for the purpose of showing that it was to the same effect as that given by him at the trial of the appeal. *Thomson v. Carruth*, 524.

To Will.

Under R. L. c. 135, § 1, which requires that a will should be attested "by three or more competent witnesses," if an instrument presented for proof as a will contains a bequest of \$300 to a church on the condition that it be "applied to the reduction of the present mortgage on the property of said church," a person who is one of the guarantors of the mortgage note given by the church is not a competent witness to the will, although the amount due on the note is small and is exceeded greatly by the value of the mortgaged property. *Crowell v. Tuttle*, 445.

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WORDS.

"Aggrieved." See *Ripley v. Brown*, 33, 35.

"Annuity." See *Welch v. Hill*, 327, 329.

"As good." See *Cawley v. Jean*, 263, 268, 269.

"Attested." See *Nunn v. Ehlert*, 471, 474, 475, 478, 481.

"Commerce." See *Marconi Wireless Telegraph Co. v. Commonwealth*, 558, 565, 569.

- "Commoners." See *Ipswich v. Proprietors of Jeffries Neck Pasture*, 487, 490.
- "Condition." See *Massachusetts Institute of Technology v. Boston Society of Natural History*, 189, 196.
- "Court of last resort." See *Tighe v. Maryland Casualty Co.* 463, 467.
- "Domestic servants." See *Murphy v. Lawrence*, 39, 40.
- "Extend." See *Whitney v. Hunt-Spiller Manuf. Co.* 318, 320.
- "Finding." See *Garden Cemetery Corp. v. Baker*, 339, 346.
- "Found." See *Potterton v. Condit*, 216, 219.
- "Heirs." See *State Street Trust Co. v. Morris*, 429, 432.
- "Heirs at law." See *Montague v. Silsbee*, 107, 110.
- "Incapacity for work." See *Sullivan's Case*, 141, 142.
- "Injured." See *Burns's Case*, 8, 12.
- "Now." See *Cawley v. Jean*, 263, 268.
- "Occupied." See *Charlesbank Homes v. Boston*, 14, 16.
- "Permanent property." See *Marconi Wireless Telegraph Co. v. Commonwealth*, 558, 580.
- "Public records." See *Commonwealth v. Seges*, 501, 503.
- "Reserved from sale forever." See *Massachusetts Institute of Technology v. Boston Society of Natural History*, 189, 193.
- "Stationary steam engine." See *McDonough v. Almy*, 409, 416.
- "Steal." See *Commonwealth v. Farmer*, 507, 509.
- "Verdict." See *McKinley v. Warren*, 310, 312.

WORKMEN'S COMPENSATION ACT.

Persons to whom Act applies.

Under St. 1911, c. 751, Part III, § 17, and Part V, § 3, as amended by St. 1912, c. 571, § 17, an employee of a contractor, who has agreed to make a part of the clothing to be furnished by a tailor who has obtained insurance under the provisions of the workmen's compensation act, has the same rights against the insurer as if the insurance had been taken out by his own employer. *Sundine's Case*, 1.

Under St. 1911, c. 751, Part V, § 2, one who was employed as a tree trimmer by an electric lighting company, and was injured by falling from a tree into which he had been sent by the authorized order of a foreman of the company for the purpose of cutting off some dead branches, may be found to have been an employee of the company at the time of his injury, although the foreman also was the tree warden of the town in which the accident occurred, no wires of the company ran through the branches of the tree, and the foreman had procured from the company authority to cut off the dead branches because he thought they were dangerous to the public. *Howard's Case*, 404.

Injuries to which Act applies.

An injury sustained by a workman employed by the week, when such workman at the noon hour has left the workroom in which he is employed and is on his way to lunch, can be found to have arisen out of and in the course of his employment, it being an incident of such employment to go out for this purpose. *Sundine's Case*, 1.

And the same is true of an injury sustained by such a workman, who when on his way to lunch is descending a stairway which is in the control of the owner of the building but which the employer and his employees have the right to use and which is the only means available for going to and from the workman's place of employment. *Sundine's Case*, 1.

Evidence tending to show that the death of an employee resulted from blood poisoning caused by bedsores resulting from the employee's being required to lie in one position in bed because of paralysis caused by a mortal injury arising out of and in the course of his employment was held to warrant a finding that the death resulted from the injury. *Burns's Case*, 8.

And it was said, that, if the bedsore had been due to mistake or negligence on the part of the physicians acting honestly, this fact would not have been material, as it would not have broken the natural and probable connection between the injury and its consequences. *Ibid*.

Dependency.

Upon the question of law, whether a finding made under the workmen's compensation act by the Industrial Accident Board, that a sister of a deceased employee was wholly dependent upon such employee for support, was warranted by the evidence, all of which was reported, where the only doubt whether the finding was warranted was created by certain vague and unsatisfactory evidence in regard to the interest of the alleged dependent sister in a house in which these two sisters and a third sister lived together, it was held, that it could not be said as matter of law that the conclusion reached by the board was erroneous. *Buckley's Case*, 354.

Amount of Award.

Under the provision of the workmen's compensation act contained in St. 1911, c. 751, Part II, § 11, as amended by St. 1913, c. 696, an award of additional compensation may be made on the ground that the legs of a workman were "so injured as to be permanently incapable of use," where a paralysis of the legs and feet was caused solely by an injury to the spine and spinal cord. *Burns's Case*, 8.

An original order for the payment of the additional compensation under the workmen's compensation act, which is provided by St. 1911, c. 751, Part II, § 11, as amended by St. 1913, c. 696, for a total or partial loss or permanent incapacity of certain members of the body of an employee, cannot be made after the employee's death. *Ibid*.

What amounts to the serious and wilful misconduct of an employer, which, under the provision of St. 1911, c. 751, Part II, § 3, requires the doubling of the compensation to be paid for an injury to an employee under the workmen's compensation act. *Ibid*.

Under St. 1911, c. 751, Part II, § 9, providing for the payment to an injured employee of a weekly compensation "while the incapacity for work resulting from the injury is total," the Industrial Accident Board have a right to find that an employee, who sustained an injury requiring the amputation of his right arm, was totally incapacitated for work until the day when he first was able to obtain work that a one-armed man could do, although he

was capable of doing such work about five months before he succeeded in procuring it. *Sullivan's Case*, 141.

Under St. 1911, c. 751, Part II, § 6, the Industrial Accident Board may award to a father as having been partly dependent for support upon the earnings of a son fifteen years of age, who received an injury arising out of and in the course of his employment from the results of which he died, the minimum compensation of \$4 a week for a period of three hundred weeks, although the wages of the boy were \$5.67 a week and the father furnished him with board, lodging and clothing which cost at least \$2.50 a week, if the boy contributed his entire wages to his father, and these with the wages of the father and of two others of the children were used completely, with no surplus, in the support of the whole family consisting of the father and mother and nine minor children including the deceased employee. *Murphy's Case*, 278.

Arbitration.

Where an injured workman, who is employed by a subscriber under the workmen's compensation act and has waived his right of action at common law, makes no claim under the act, but brings instead an action at common law against his employer, the insurer under St. 1911, c. 751, Part III, § 5, as amended by St. 1912, c. 571, § 10, may notify the Industrial Accident Board, who thereupon must call for the formation of a committee of arbitration. *Young v. Duncan*, 346.

Waiver by Employee of Common Law Rights.

By St. 1911, c. 751, Part I, § 5, an employee of a subscriber under the workmen's compensation act waives his right of action at common law to recover damages for personal injuries, unless he gives his employer at the time of his contract of hire notice in writing that he claims such right. *Young v. Duncan*, 346.

And, if the employer was at the time of the employment a subscriber, the waiver is not affected by ignorance of this fact on the part of the employee, and it is immaterial whether or not the employer gave to the employee the notice required by St. 1911, c. 751, Part IV, § 21, as amended by St. 1912, c. 571, § 16. *Ibid.*

The foregoing provision of the workmen's compensation act was interpreted by this court to be an absolute and unconditional provision not dependent upon knowledge by the employee or upon notice to him that the employer was a subscriber at the time of the contract of hire, is constitutional. *Ibid.*

Effect upon Non-subscribing Employer.

In an action at common law by a workman against his employer for personal injuries alleged to have been caused by the failure of the defendant to give the plaintiff notice of the dangers incident to his employment, which happened after St. 1911, c. 751, Part I, § 1, took effect, so that neither contributory negligence of the plaintiff, the negligence of a fellow employee nor the plaintiff's assumption of the risk of injury is open as a defense, the only question to be tried is whether the defendant was negligent in failing to warn the plaintiff. *Dooley v. Sullivan*, 597.

Serious and Wilful Misconduct of Employer.

What amounts to the serious and wilful misconduct of an employer, which, under the provision of St. 1911, c. 751, Part II, § 3, requires the doubling of the compensation to be paid for an injury to an employee under the workmen's compensation act. *Burns's Case*, 8.

Serious and Wilful Misconduct of Employee.

The fact that an injury to an employee was occasioned by his disregard of an order of his employer is not decisive against him to show that he was "injured by reason of his serious and wilful misconduct" within the meaning of the workmen's compensation act. *Nickerson's Case*, 158.

Conduct of a whitewasher in a factory who, being directed to work near certain machinery and shafting during the noon hour when the machinery was not in motion, began to work, expecting that the machinery would be stopped at noon when he would continue to work with the machinery at rest, but whose clothing was caught by a projection on the collar of the shafting was held, to warrant a finding that the employee, although in disobedience of an order, was not guilty of "serious and wilful misconduct" within the meaning of St. 1911, c. 751, Part II, § 2. *Ibid*.

Effect of Employee's Death.

An original order for the payment of the additional compensation under the workmen's compensation act, which is provided by St. 1911, c. 751, Part II, § 11, as amended by St. 1913, c. 696, for a total or partial loss or permanent incapacity of certain members of the body of an employee, cannot be made after the employee's death. *Burns's Case*, 8.

Whether, where under the provisions of the workmen's compensation act an injured employee upon his own application has been awarded during his lifetime a specific compensation for a stated number of weeks for incapacity to work and his death occurs before the expiration of the period, the right thus adjudicated ceases at his death or whether the payments must be continued until the end of the appointed time, was referred to as a question that was not passed upon. *Ibid*.

Appeal.

Under the workmen's compensation act a finding of the Industrial Accident Board, that a personal injury to an employee arising out of and in the course of his employment and resulting in his death was not due to the serious and wilful misconduct of his employer, so that the compensation to be paid is not to be doubled under St. 1911, c. 751, Part II, § 3, will not be disturbed, on an appeal from a decree of the Superior Court in accordance therewith, if there was any evidence to warrant it. *Burns's Case*, 8.

Where under the workmen's compensation act a committee of arbitration was formed and made an award in favor of an injured employee, and a claim for review by the Industrial Accident Board was filed by the employee but afterwards was withdrawn by him before any hearing, and, upon motion of the insurer, a decree has been made by the Superior Court for the pay-

ment of compensation in accordance with the report of the committee of arbitration, under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, the employee has no right of appeal from such decree. *Young v. Duncan*, 346.

Although under the workmen's compensation act there can be no appeal from a finding of the Industrial Accident Board if there was any evidence to support it, yet, where all the evidence is reported, the question of law whether the evidence was sufficient to warrant the finding may be presented for decision by this court. *Buckley's Case*, 354.

Upon the question of law, whether a finding made under the workmen's compensation act by the Industrial Accident Board, that a sister of a deceased employee was wholly dependent upon such employee for support, was warranted by the evidence, all of which was reported, where the only doubt whether the finding was warranted was created by certain vague and unsatisfactory evidence in regard to the interest of the alleged dependent sister in a house in which these two sisters and a third sister lived together, it was held, that it could not be said as matter of law that the conclusion reached by the board was erroneous. *Ibid*.

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